(25,584)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 754.

CLEVE W. VAN DYKE, IDA A. VAN DYKE, HIS WIFE, AND PATRICK H. McGUIRE, PLAINTIFFS IN ERROR,

vs.

ARIZONA EASTERN RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

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1 In the Supreme Court of the State of Arizona.

Cause No. 1470.

CLEVE W. VAN DYKE and IDA A. VAN DYKE, His Wife, and PATRICK H. MCGUIRE, Appellants,

vs.

ARIZONA EASTERN RAILROAD COMPANY, a Corporation, Appellee.

TRANSCRIPT OF RECORD.

Appearances:

For the Appellant: Richard E. Sloan, Fred C. Jacobs.
For the Appellee: Chas. L. Rawlins, P. C. Little.

2 In the Superior Court, Gila County, State of Arizona.

ARIZONA EASTERN RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

CLEVE W. VAN DYKE and IDA A. VAN DYKE, His Wife, and PATRICK H. MCGUIRE, Defendants.

Complaint.

Plaintiff, Arizona Eastern Railroad Company, complains of Cleve W. Van Dyke and Ira A. Van Dyke, his wife, and Patrick H. McGuire, defendants, and for first cause of action, alleges:

I.

That plaintiff, Arizona Eastern Railroad Company, is a corporation organized under the laws of the State of Arizona relating to the organization of corporations and the consolidation of corporations for purposes of constructing, owning, maintaining and operating railroads, and that it is and has been since its organiza-
3 tion engaged in the railway business as a common carrier in the State of Arizona and within Gila County and alleges that it is a consolidated corporation and the successor of the Gila Valley Globe and Northern Railway Company.

II.

This plaintiff alleges that the Gila Valley, Globe and Northern Railway Company was duly organized as a railroad corporation under the laws of the Territory of Arizona relating to the formation of railroad corporations, for the purpose of maintaining and operating a railroad from Bowie, in the County of Cochise, through the

County of Graham, and through a portion of the County of Gila, in the said State of Arizona; said corporation was organized during the year 1894, and after its organization was completed and on the 1st day of October, 1896, did file with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization under the same, and thereafter filed maps of its proposed line of railroad, which articles of incorporation and proof of organization were duly approved by the Secretary of the Interior, and on the 30th day of December, 1909, it filed its amended map with the said Secretary of the Interior, which was thereafter approved, showing its right of way over the premises herein described.

That prior to the 1st day of February, 1910, the respective boards of directors of the Gila Valley, Globe and Northern Railway Company and five certain other railroad corporations, to-wit, Arizona Eastern Railroad Company, Arizona & Colorado Railroad Company, Maricopa & Phœnix Railroad Company, corporations duly organized under the laws of the Territory of Arizona, and Arizona & Colorado Railroad Company, of New Mexico, and Arizona Eastern Railroad Company of New Mexico, corporations duly organized under the laws of New Mexico, did enter into a certain agreement, whereby it was agreed that said corporations should be consolidated upon certain terms and in a certain manner set forth in said agreement, which consolidation and said agreement were thereafter ratified and confirmed in writing by stockholders representing more than three-fourths of the subscribed capital stock of each of said corporations, respectively, and thereupon articles of incorporation and consolidation were prepared, setting forth therein the matters and things required by the provisions of paragraph 864, Revised Statutes of Arizona 1901, as amended by Chapter 83 of the Acts of the Twenty-fifth Legislative Assembly of the Territory of Arizona, which articles of incorporation and consolidation were signed and countersigned by the presidents and secretaries of said several constituent corporations and sealed with their respective corporate seals, and annexed thereto were memorandums of the ratification and confirmation thereof by the stockholders of each of said constituent corporations which memorandums were respectively signed by stockholders representing more than three-fourths of the capital stock of said corporations respectively; that upon the completion of the said articles of incorporation and consolidation as aforesaid, the same were, on the 1st day of February, 1910, filed in the office of the auditor of the then Territory of Arizona, thereupon and thereby the said several constituent corporations, including the Gila Valley, Globe and Northern Railway Company, became extinct, and a new and consolidated corporation was formed, and that this plaintiff is such new and consolidated corporation; and by virtue of said consolidation and by operation of law, this plaintiff is the successor of said Gila Valley, Globe and Northern Railway Company, and as such succeeded to and became the owner of all its property, rights, franchises, rights of way and assets, of every description, including its right of way upon and over the lands and premises hereinafter described.

III.

That the defendants are all residents of Gila County, State of Arizona.

IV.

That, while the premises hereinafter described were public lands of the United States, the said Gila Valley, Globe and Northern Railway Company, under and by virtue of an Act of Congress approved March 3, 1875, entitled, "An Act granting to railroads the right of way through the public lands of the United States," entered upon and acquired the right of way over and across the premises hereinafter described to the extent of 100 feet from each side of the
6 center line of its track, by constructing its said railroad over and across the said premises, and thereafter, on the 30th day of December, 1909, filed its said map or profile aforesaid showing such right of way over, across and through said premises, which map or profile was approved by the Secretary of the Interior; and the said Gila Valley, Globe and Northern Railway Company, and its successor, this plaintiff, have ever since the 5th day of October, 1909, and now is operating its trains over and across said premises, and ever since said date used and enjoyed its said right of way until the defendants herein unlawfully seized that portion of said right of way herein described.

V.

That the plaintiff, by reason of the facts herein stated, now is, and ever since the 5th day of October, 1909, and prior thereto, has been, the owner in fee of that certain lot, piece or parcel of land situate, lying and being in Gila County, State of Arizona, and bounded and described as follows, to-wit:

That portion of the N. W. ¼ of the S. E. ¼ of Section 30, T. 1 N., R. 15 E., G. & S. R. B. & M., as follows: That portion of the two hundred (200) foot strip of right of way of the Arizona Eastern Railroad Company at Miami, more particularly described as follows: Beginning at a point on the east and west center line of Section 30 one hundred thirteen (113) feet west from its intersection with the center of the main line of the Arizona Eastern Railroad Com-
7 pany's extension to Miami, which intersection is at engineer's station 479 x 72; thence west along the said east and west center line of Section 30, forty-eight and four-tenths (48.4) feet to the north right of way line of said Arizona Eastern Railroad Company; thence westerly by tangent and curves along said north right of way line, which is parallel to and one hundred (100) feet northerly from said center of main line, five hundred forty-three and eight-tenths (543.8) feet to a point opposite engineer's station 486 x 50; thence southerly radially to said center of main line fifty (50) feet; thence easterly by curves and tangent, parallel to and fifty (50) feet northerly from said center of main line, five hundred forty-six and four tenths (546.4) feet to a point opposite engineer's

station 481 x 00; thence northerly at right angles, twenty (20) feet; thence easterly, parallel to and seventy (70) feet distant from said center of main line, thirty-nine (39) feet to print of beginning, containing 0.64 acres, more or less, said tract being marked (1) and colored red upon blue print annexed hereto, marked Exhibit "A," and made a part hereof.

And beginning at a point on the above mentioned east and west center line of Section 30 eighty and seven-tenths (80.7) feet east of its intersection with the above mentioned center of main line; thence east along said east and west center line of Section 30, eighty and seven-tenths (80.7) feet to the south right of way line
8 of said Arizona Eastern Railway Company; thence westerly by tangent and curves along said south right of way line which is parrallel to and one hundred (100) feet southerly from said center of main line thirteen hundred three and six-tenths (1303.6) feet to a point on the north and south center line of Section 30; thence north, along said north and south center line, fifty-five (55) feet to a point fifty (50) feet radially from said center of main line; thence easterly by curves and tangent parallel to and fifty (50) feet southerly from said center of main line twelve hundred four and eight-tenths (1204.8) feet to point of beginning, containing 1.44 acres, more or less, said tract being marked (2) and colored red upon blue print annexed hereto, marked exhibit "A" and made a part hereof.

Also, that portion of the two hundred (200) foot strip of right of way of the Arizona Eastern Railroad Company, at Miami, more particularly described as follows: Beginning at a point on the north right of way line of the Arizona Eastern Railroad Company radially opposite engineer's Station 486 x 50; thence westerly by curves along said north right of way line which is parallel to and one hundred (100) feet northerly from the center of the main line of said Arizona Eastern Railroad Company three hundred and four (304) feet:
9 thence south thirty-six degrees eighteen minutes (36 deg. 18 min.) east, twenty-eight and three-tenths (28.3) feet to a point seventy-two (72) feet northerly from and radially opposite engineer's station 489 x 61 of said center of main line; thence easterly three hundred three (303) feet to a point seventy-nine and three tenths (79.3) feet northerly from and radially opposite engineer's station 486 x 50 of said center of main line; thence northerly radially to said center of main line twenty and seven-tenths (20.7) feet to place of beginning, containing 0.15 acres, more or less, said tract being marked (3) and colored yellow upon the blue print annexed to this complaint and made a part hereof, and marked exhibit "A."

VI.

That the defendants and each of them claim an estate or interest therein adverse to this plaintiff.

VII.

That the claims of the said defendants or either of them are without any right whatever, and that said defendants, nor neither of them have not any estate, right, title or interest whatever in said land or premises or any part thereof.

For a further and separate cause of action, the plaintiff, Arizona Eastern Railroad Company, complains of the defendants, Cleve W. Van Dyke and Ida A. Van Dyke, his wife, and Patrick H. McGuire, and for cause of action, alleges:

10 I.

This plaintiff re-alleges and re-avers each and every allegation contained in paragraphs I, II, III and IV of the first cause of action herein as fully and completely as if re-written and re-expressed herein.

II.

That, on the 5th day of October, 1909, and prior thereto, this plaintiff was seized in fee and possessed and entitled to the possession of that certain piece or parcel of land situated in Gila County, State of Arizona, described as follows:

That portion of the N. W. ¼ of the S. E. ¼, of Section 30, T. 1 N., R. 15 E., G. & S. R. B. & M, as follows: That portion of the two hundred (200) foot strip of right of way of the Arizona Eastern Railroad Company at Miami more particularly described as follows: Beginning at a point on the east and west center line of Section 30 one hundred thirteen (113) feet west from its intersection with the center of the main line of the Arizona Eastern Railroad Company's extension to Miami, which intersection is at engineer's station 479 x 72; thence west, along the said east and west center line of Section 30, forty-eight and four-tenths (48.4) feet to the north right of way line of said Arizona Eastern Railroad Company; thence westerly by tangent and curves along said north right of way line, which is parallel to and one hundred (100) feet northerly from said
11 center of main line, five hundred forty-three and eight-tenths (543.8) feet to a point opposite engineer's station 486:50; thence southerly radially to said center of main line fifty (50) feet; thence easterly by curves and tangent, parallel to and fifty (50) feet northerly from said center of main line, five hundred forty-six and four-tenths (546.4) feet to a point opposite engineer's station 481:00; thence northerly at right angles, twenty (20) feet; thence easterly, parallel to and seventy (70) feet distant from said center of main line, thirty-nine (39) feet to point of beginning, containing 0.64 acres, more or less, said tract being marked (1) and colored red upon blue print annexed hereto, marked Exhibit "A," and made a part hereof.

Also beginning at a point on the above mentioned east and west center line of Section 30 eighty and seven-tenths (80.7) feet east

of its intersection with the above mentioned center of main line; thence east along said east and west center line of Section 30, eighty and seven-tenths (80.7) feet to the south right of way line of said Arizona Eastern Railroad Company; thence westerly by tangent and curves along said south right of way line which is parallel to and one hundred (100) feet southerly from said center of main line thirteen hundred three and six-tenths (1303.6) feet to a point on the north and south center line of Section 30; thence north, along said north and south center line, fifty-five (55) feet to a point fifty (50)
12 feet radially from said center of main line; thence easterly by curves and tangent parallel to and fifty (50) feet southerly from said center of main line twelve hundred four and eight-tenths (1204.8) feet to point of beginning, containing 1.44 acres, more or less, said tract being marked (2) and colored red upon blue print annexed hereto, marked exhibit "A" and made a part hereof.

Also, that portion of the two hundred (200) foot strip of right of way of the Arizona Eastern Railroad Company, at Miami, more particularly described as follows: Beginning at a point on the north right of way line of the Arizona Eastern Railroad Company radially opposite engineer's station 486:50; thence westerly by curves along said north right of way line which is parallel to and one hundred (100) feet northerly from the center of the main line of said Arizona Eastern Railroad Company three hundred and four (304) feet; thence south thirty-six degrees eighteen minutes (36 deg. 18 min.) east, twenty-eight and three-tenths (28.3) feet to a point seventy-two (72) feet northerly from and radially opposite engineer's station 489:61 of said center of main line; thence easterly three hundred three (303) feet to a point seventy-nine and three tenths (79.3) feet northerly from and radially opposite engineer's station 486:50 of said center of main line; thence northerly radially to said
13 center of main line twenty and seven-tenths (20.7) feet to place of beginning, containing 0.15 acres, more or less, said tract being marked (3) and colored yellow upon the blue print annexed to this complaint, marked exhibit "A" and made a part hereof.

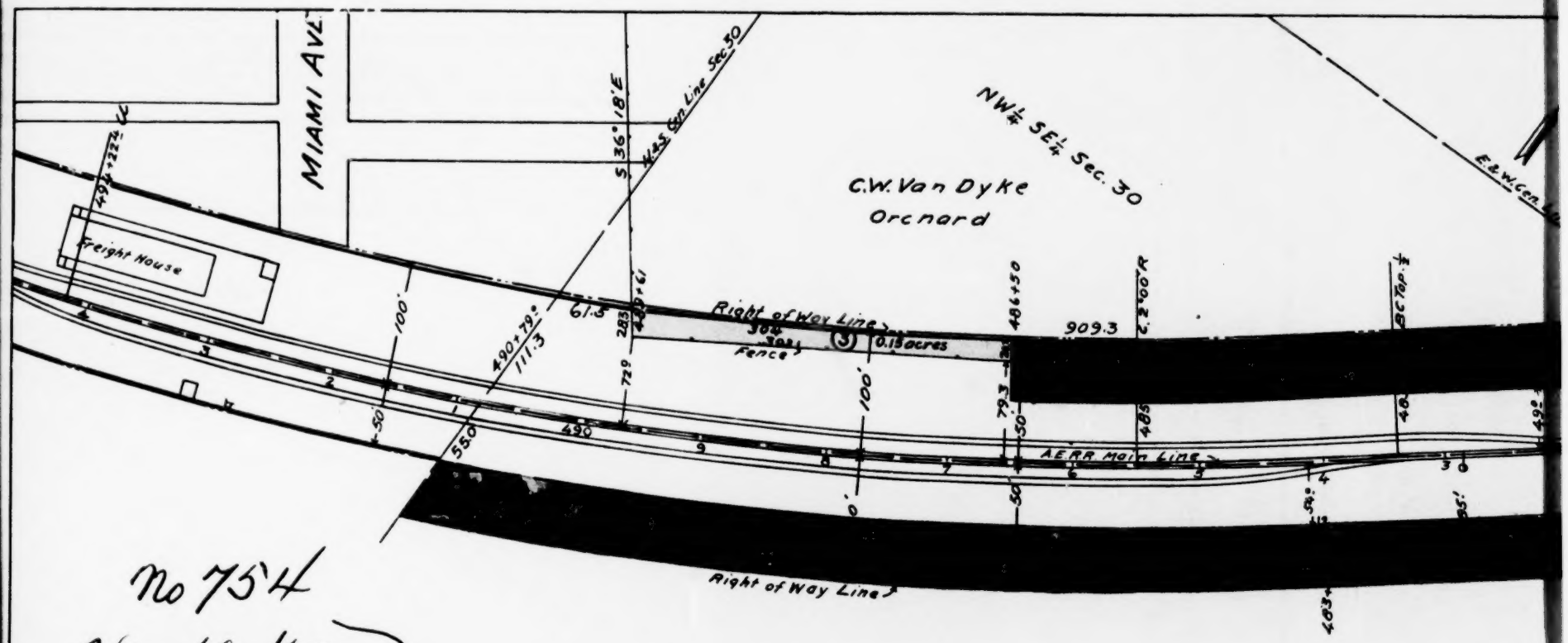
III.

That while the plaintiff was so seized, the defendants afterwards, to-wit, on or about the 22nd day of December, 1909, and without right or title, entered into the possession of the demanded premises and seized and ejected plaintiff therefrom and now unlawfully withholds the possession thereof from this plaintiff, to its damage in the sum of one hundred ($100.00) dollars.

IV.

That the value of the rents, issues and profits of said premises from the said 22nd day of December, 1909, and while the plaintiff has been excluded therefrom by the defendants, is one hundred ($100.00) dollars.

Wherefor, plaintiff prays judgment against said defendants as



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Van Dyke.
v
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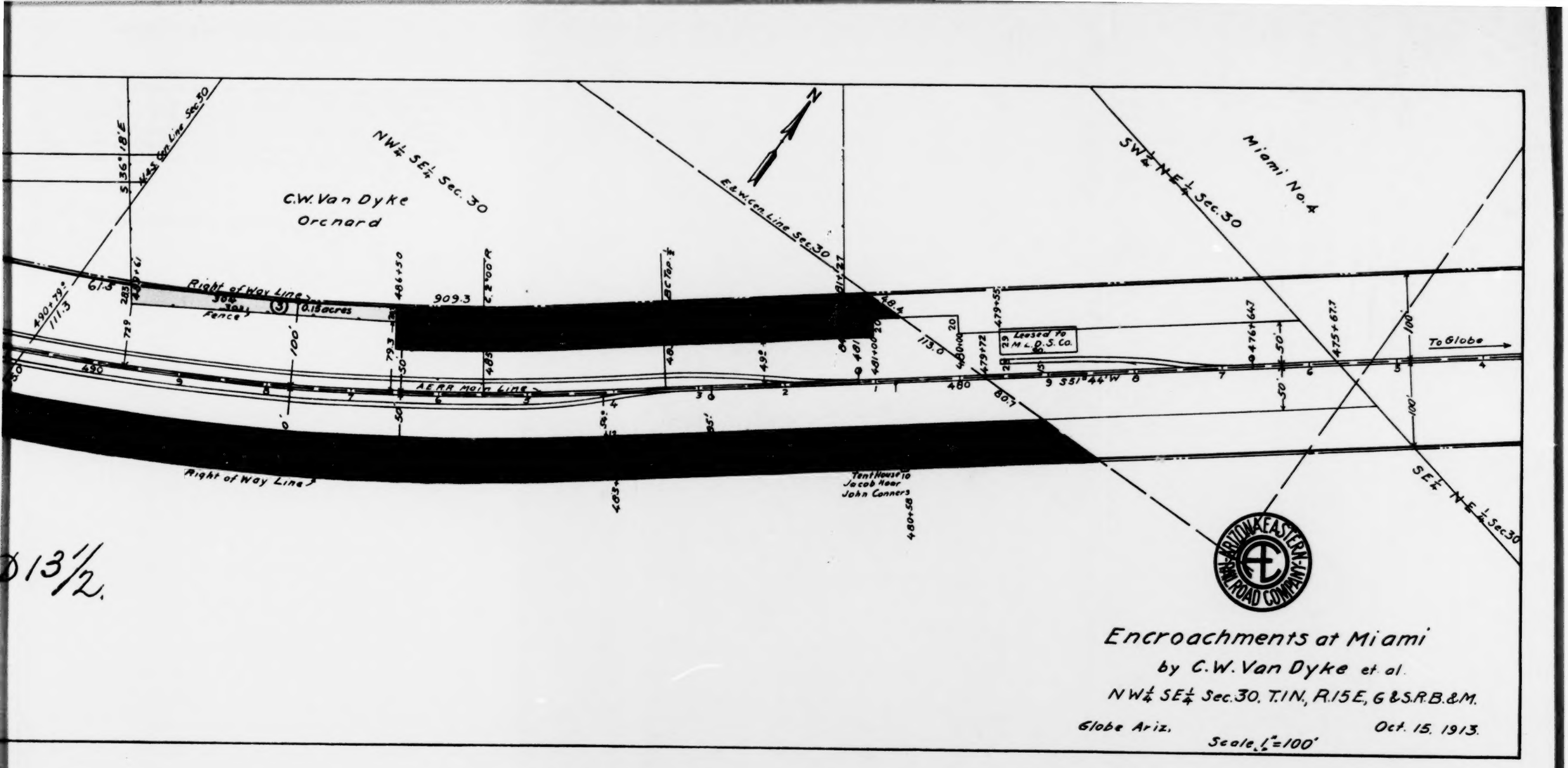
R.R. Co.

P 13 1/2.



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ARIZONA EASTERN RAILROAD COMPANY

Encroachments at Miami

by C. W. Van Dyke et. al.

NW¼ SE¼ Sec. 30. T. 1 N., R. 15 E., G. & S. R. B. & M.

Globe Ariz. Oct. 15. 1913.

Scale 1" = 100'

follows:

On the first cause of action:

1. That the defendants may be required to set forth the nature and extent of their claims; and that all adverse claims of defendants may be determined by a decree of this court.

2. That by said decree it be declared and adjudged that the defendants have no estate or interest whatever in or to said lands and premises; and that the title of plaintiff is good and valid.

(Here follows map marked page 13½.)

3. That the defendants and each of them be forever en-
14 joined and debarred from asserting any claim whatever in or to said land or premises adverse to this plaintiff; and for such other relief as to this honorable court shall seem meet and agreeable to equity.

On the second cause of action as follows:

1. For the recovery of the possession of the demanded premises, and for the sum of one hundred ($100.00) dollars damages for withholding the possession thereof, and

2. For the costs of plaintiff's suit against defendants in this action.

RAWLINS & LITTLE,
Attorneys for Plaintiff.

STATE OF ARIZONA,
County of Gila, ss:

C. C. Mallard, being first duly sworn deposes and says: That he is a superintendent of the plaintiff herein, and as such superintendent makes this verification for and on behalf of plaintiff; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and as to those matters he believes it to be true.

C. C. MALLARD.

Subscribed and sworn to before me this 12th day of November, A. D. 1913.

My commission expires March 13th, 1916.

[SEAL.] CULLEN A. LITTLE,
Notary Public.

Filed Nov. 12, 1913, at 2:30 p. m.
[Map.]

15 [Title of Court and Cause.]

Second Amended Answer.

Now come the defendants above named and for a second amended demurrer, demur to the first cause of action stated in plaintiff's complaint upon the ground that said cause of action does not state facts sufficient to constitute a cause of action against these defendants or either of them.

Defendants demur to the second cause of action upon the ground that the facts stated therein are not sufficient to constitute a cause of action against these defendants or either of them.

Wherefor, defendants pray that these demurrers be sustained and that they be awarded their costs herein expended.

F. C. JACOBS,
SLOAN & WESTERVELT,
Attorneys for Defendants.

Second Amended Answer.

Should defendants' demurrers to plaintiff's complaint be overruled, defendants for a second amended answer to said complaint, admit, deny and allege as follows:

I.

Answering the first cause of action stated in plaintiff's complaint, defendants admit the allegations contained in the first paragraph of said first cause of action set up in said plaintiff's complaint, save and except that it denies that said Arizona Eastern Railroad Company is or has even been a corporation organized for the purpose of constructing, owning, maintaining and operating a railroad at, near, over or across the premises set forth and described in said complaint.

II.

Answering Paragraph 2 of said First cause of action, defendants deny that the Gila Valley, Globe & Northern Railway Company was duly organized as a railroad corporation under the laws of the Territory of Arizona, relating to the formation of railroad corporations for the purpose of maintaining and operating a railroad from Bowie in the County of Cochise through the County of Graham and through a portion of the County of Gila, in the said State of Arizona, and allege the fact to be that under and by virtue of its Articles of Incorporation and amendments thereto, said railroad company was authorized to build, maintain and operate a railroad "to run from a point on the Southern Pacific Railroad at or near Bowie Station in Cochise County, Territory of Arizona, in to or pass through the Counties of Cochise, Graham and Gila on the most direct road to the Town of Globe, in the said Gila County, Territory of Arizona, and to build, maintain and operate branch lines commencing at a point on said main line of said railroad at or near San Carlos and running thence in a general southeasterly direction to a point at or near the mouth of the San Pedro River in the County of Pinal; and a further branch line commencing at some convenient point on the said above mentioned branch line east of Dripping Springs Wash and crossing the Gila River to some convenient point on the Arizona Eastern Railroad."

And in this behalf defendants further allege that said Gila Valley, Globe & Northern Railroad has never at any time been authorized or empowered under its articles of incorporation or any amendments thereto, to build, maintain or operate any railroad or branch line other than as above set forth.

Further answering Paragraph 2 of said first cause of action, defendants deny that the said Gila Valley, Globe & Northern Railway Company has ever filed with the Secretary of the Interior any

proof that it was duly organized for the purpose of building, maintaining or operating any other railroad or branch railroad other than as above set forth.

Defendants further deny that the Secretary of the Interior has ever approved any map showing plaintiff's right of way over the premises in said complaint described and defendants further deny that plaintiff as the successor of the said Gila Valley, Globe & Northern Railway Company, or otherwise, has succeeded to and become the owner of the lands and premises in said complaint described and set forth, or the owner of any right of way upon, over or across the same.

III.

Answering Paragraph IV of said first cause of action, defendants deny that the Gila Valley, Globe and Northern Railway Company entered upon and acquired any right of way over and across
18 the premises therein described under and by virtue of the Act of Congress of March 3rd, 1875, and deny that it acquired any right of way over and across the premises hereinafter described to the extent of one hundred feet from each side of the center line of its track by constructing its said railroad over and across said premises or otherwise, or at all, and deny that the plaintiff acquired any right of way over and across the premises therein described by constructing its said railroad over and across said premises; admit that thereafter on the 30th day of December, 1909, it filed its map or profile aforesaid showing such right of way over, across and through said premises, which map or profile was approved by the Secretary of the Interior, but deny that said map or profile was ever approved by the Secretary of the Interior so as to grant or confirm any right of way over, across or through said premises in said plaintiff; admit that the Gila Valley, Globe and Northern Railway Company, and its successor, this plaintiff, have ever since the 5th day of October, 1909, and now is operating its trains over and across said premises, but deny that ever since said date the said Gila Valley, Globe and Northern Railway Company, or its successor, this plaintiff, have used and enjoyed its said right of way until the defendants herein unlawfully or otherwise seized that portion of said right of way herein described, but allege that the said Gila Valley, Globe and Northern Railway Company and its successor, this plaintiff have used a right of way over and across said premises to the ex-
19 tent of about fifty feet in width on each side of the center line thereof, but deny that plaintiff by virtue thereof has acquired any right thereto.

IV.

In answering paragraph V of said first cause of action, the defendants deny that the plaintiff, by reason of the facts therein stated, or otherwise, or at all, now is, or ever since the 5th day of October, 1909, or prior thereto has been, the owner in fee or otherwise of those certain lots or parcels of land situate, lying and being

in Gila County, State of Arizona, bounded and described as follows, to-wit:

That portion of the N. W. ¼ of the S. E. ¼ of Section 30; T. 1 N. R. 15 E., G. & S. R. B. & M., described as follows: Beginning at a point on the east and west center line of Section 30 one hundred thirteen (113) feet west from its intersection with the center of the main line of the Arizona Eastern Railroad Company's extension to Miami, which intersection is at engineer's station 479:72; thence west, along the said east and west center line of Section 30, forty-eight and four-tenths (48.4) feet to the north right of way line of said Arizona Eastern Railroad Company; thence westerly by tangent and curves parallel to and one hundred (100) feet northerly from said center of main line, five hundred forty-three and eight-tenths (543.8) feet to a point opposite engineer's station 486:50; thence southerly radially to said center of main line
20 fifty (50) feet; thence easterly by curves and tangent, parallel to and fifty (50) feet northerly from said center of main line, five hundred forty-six and four-tenths (546.4) feet to a point opposite engineer's station 481:00; thence northerly at right angles, twenty (20) feet; thence easterly, parallel to and seventy (70) feet distant from said center of main line, thirty-nine (39) feet to point of beginning, containing 0.64 acres, more or less, said tract being marked (1) and colored red upon blue print annexed to plaintiff's complaint and marked Exhibit "A."

And, beginning at a point on the above mentioned east and west center line of Section 30 eighty and seven-tenths (80.7) feet east of its intersection with the above mentioned center of main line; thence east along said east and west center line of Section 30, eighty and seven-tenths (80.7) feet to the south right of way line of said Arizona Eastern Railroad Company; thence westerly by tangent and curves parallel to and one hundred (100) feet southerly from said center of main line thirteen hundred three and six-tenths (1303.6) feet to a point on the north and south center line of Section 30; thence north, along said north and south center line, fifty-five (55) feet to a point fifty (50) feet radially from said center of main line; thence easterly by curves and tangent parallel to and fifty (50) feet southerly from said center of main line twelve hundred four and eight-tenths (1204.8) feet to point of be-
21 ginning, containing 1.44 acres, more or less, said tract being marked (2) and colored red upon blue print annexed to plaintiff's complaint and marked Exhibit "A."

Also, beginning at a point on the north right of way line of the Arizona Eastern Railroad Company radially opposite Engineer's station 486:50; thence westerly by curves parallel to and one hundred (100) feet northerly from the center of the main line of said Arizona Eastern Railroad Company three hundred and four (304) feet; thence south thirty-six degrees eighteen minutes (36 deg. 18 min.) east, twenty-eight and three tenths (28.3) feet to a point seventy-two (72) feet northerly from and radially opposite engineer's station 489.61 of said center of main line; thence easterly three hundred three (303) feet to a point seventy-nine and three

tenths (79.3) feet northerly from and radially opposite engineer's station 486:50 of said center of main line; thence northerly radially to said center of main line twenty and seven-tenths (20.7) feet to place of beginning, containing 0.15 acres, more or less, said tract being marked (3) and colored yellow upon the blue print annexed to plaintiff's complaint and marked Exhibit "A."

V.

In answering paragraph VI of said first cause of action, defendants admit that they and each of them claim an estate or interest therein adverse to this plaintiff.

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VI.

In answering paragraph VII of said first cause of action, the defendants deny that the claims of the said defendants, or either of them, are without any rights whatever, or that the defendants or either of them have not any estate, right, title or interest whatever in said land or premises or any part thereof.

VII.

Further answering said first cause of action and as a further defense thereto, the defendants allege that prior to the year 1908 a National Forest Reserve, named and known as the Crook National Forest, was created in the County of Gila, State of Arizona, by executive order of the President of the United States duly given and made, which said Crook National Forest included within its boundaries the land described in said first cause of action of plaintiff's complaint herein, and that at the time the said Gila Valley, Globe and Northern Railway Company entered upon the land described in said first cause of action, for the purpose of surveying and constructing its said railroad over, through and across said premises, the said land covered by said right of way was a part and portion of said Crook National Forest Reservation; that the defendant, Cleve W. Van Dyke, is informed and believes, and on such information and belief alleges the fact to be, that said Gila Valley, Globe and Northern Railway Company, prior to the date of its entry upon said land and prior to the date of the construc-

23 tion of its said railroad over and upon said land, had never made any application to the Forestry Department of the United States or to the Secretary of the Interior of the United States, or to any other Department of the Government, person or official for a permit or privilege to construct said road upon and over said land and no such permit or privilege was ever granted said company.

That said Gila Valley, Globe and Northern Railway Company, prior to its entry upon said land and prior to the construction of said railroad, had not filed its map or profile of said road with the Secretary of the Interior of the United States nor in the local Land

Office at Phœnix, Arizona, or elsewhere, showing a change or deviation of its line of definite location, as shown by its maps of its proposed line of railroad filed with the Secretary of the Interior in October, 1906.

That said Gila Valley, Globe and Northern Railway Company did not, before its entry upon said land, or the construction of said road over and across said premises, relinquish or abandon its line of definite location, as stated in said map filed with the Secretary of the Interior in October, 1906; that said line of railroad so constructed over and across said premises, as alleged in plaintiff's first cause of action, is within one mile of the line of definite location as depicted upon its maps of definite location filed with the Secretary of the Interior in October, 1906.

VIII.

That while the land described in said first cause of action was a part and portion of said Crook National Forest and before
24 the Gila Valley, Globe and Northern Railway Company had entered upon said land for the purpose of surveying its line of railroad, as described in said first cause of action, and before the construction of said road thereon, the defendant, Cleve W. Van Dyke, was in possession of the N. W. ¼ S. E. ¼ of Section 30, Township 1 N., Range 15 East, G. & S. R. B. & M., being the same land embraced within said Crook National Forest, and the said Cleve W. Van Dyke was in possession and occupying said land with a bona fide intent of entering the same as homestead in the Land Office of the United States, and that pursuant to said bona fide intent and while said land was a part and portion of the said Crook National Forest, said defendant, Cleve W. Van Dyke, did file his application in the Forestry Department at Washington for a listing and segregation of said land from said Crook National Forest, and that the said Cleve W. Van Dyke was referred by the Forestry Department at Washington to the District Forester at Albuquerque as the office in which said application should be filed; that thereafter on July 26th, 1909, said defendant, Cleve W. Van Dyke, filed his written application in the office of the District Forester at Albuquerque, New Mexico, for the examination and listing, under the Act of June 11th, 1906, of the S. E. ¼ S. W. ¼, S. W. ¼ S. E. ¼, N. W. ¼ S. E. ¼ of Section 30, T. 1 N., R. 15 E., G. & S. R. B. & M., which application was in due form provided by law, and the land described in said application being a part and portion of the Crook National Forest, and over which said railroad
25 was thereafter constructed, and the said Cleve W. Van Dyke thereupon obtained from the District Forester at Safford, Arizona, a special use permit authorizing him to occupy, possess and improve said land described in said application and in the first cause of action of plaintiff's complaint herein, and the said Cleve W. Van Dyke, under said special use permit occupied and possessed said land, improved the same, constructed buildings, and lived and resided thereon; that thereafter on the 27th day of August, 1909,

the President of the United States did, by executive order duly given and made, order a tract of land including the land so described in plaintiff's first cause of action, and including the homestead entry of the said Cleve W. Van Dyke, hereinafter described in the patent to him from the United States Government, segregated from said Crook National Forest and opened for settlement and homestead entry. That on the 22nd day of November, 1909, the Secretary of the Interior, pursuant to said executive order of the president, did, by order duly given and made, reduce said Crook National Forest by a segregation of said land from said Crook National Forest and open the same to settlement and homestead entry to take effect December 22nd, 1909; that on December 22nd, 1909, the defendant, Cleve W. Van Dyke, duly entered said land in the United States Land Office at Phœnix, Arizona, by filing therein his application to the United States Government for homestead entry embracing said land, to-wit, the S. E. ¼ of Section 30, T. 1 N., R. 15 E., G. & S. R. B. & M., and the defendant continued to
26 occupy, cultivate and improve said land and reside thereon, together with his family, continuously since said time, and up to the present date, and that on the 19th day of February, 1912, the President of the United States executed and issued to the defendant, Cleve W. Van Dyke, a United States patent conveying to the said Cleve W. Van Dyke said land; that the said land so patented to the defendant, Cleve W. Van Dkye, is the same land described in plaintiff's first cause of action herein.

That the said Gila Valley, Globe and Northern Railway Company entered upon said premises for the purpose of surveying and constructing said railroad upon, over and across the same while the defendant, Cleve W. Van Dyke, was a settler and locator thereon, holding and occupying and possessing the same under said special use permit, and that said survey of said line of railroad by said Gila Valley, Globe and Northern Railway Company, and the construction of said road by said Gila Valley, Globe and Northern Railway Company was without the consent of the United States Government or the Secretary of the Interior or the Forestry Department of the United States and said entry of said Gila Valley, Globe and Northern Railway Company for the purpose of said survey and construction, was without authority of law and the said Gila Valley, Globe and Northern Railway Company, was a trespasser on said land and premises, and that at the time of its entry upon said land and the construction of its road thereon, said land was
27 withdrawn from and was not a part of the public lands of the United States and was not subject to any settlement or occupancy whatsoever; that the said Gila Valley, Globe and Northern Railway Company by reason of its said entry and the survey and construction of said road, acquired no rights whatsoever as against the defendant or defendants, or as against the United States Government.

IX.

Defendants by way of further defense to plaintiff's first cause of action aver that the Gila Valley, Globe and Northern Railway Company has never had or possessed under and by virtue of its charter any right, power or authority to build, maintain or operate a railroad at, near, adjacent to, over or across the lands set forth and described in plaintiff's complaint and which are in controversy in this action, and in this behalf defendants further aver that said lands and the right of way sought to be established by plaintiff in this suit are not situate at, near, along or adjacent to any line of railroad described or referred to in the Articles of Incorporation of the said Gila Valley, Globe & Northern Railway Company or any amendments of or to said articles, but are situate many miles distant from any line of railroad described in or referred to in said articles and any amendments made thereto.

Defendants further aver that the plaintiff, the Arizona Eastern Railroad Company, has no right, power or authority vested in it by its articles of incorporation or any amendment thereto or
28 otherwise to build, maintain or operate a line of railroad at, near, across or adjacent to said lands and has no right, power or authority to acquire any right of way whatsoever at, over or across said lands.

Now come the defendants above named, and as and for a second amended answer to the second cause of action set forth in plaintiff's complaint herein, admit, deny and allege as follows, to-wit:

I.

In answering the second cause of action stated in plaintiff's complaint, defendants deny each and every allegation contained therein, except such allegations as are herein specifically admitted, or admitted by operation of law.

II.

In answering Paragraph IV of said second cause of action, which is re-alleged by reference in Paragraph I thereof, the defendants admit that the said Gila Valley, Globe and Northern Railway Company entered upon the premises therein described, but deny that it acquired any right of way over and across the premises hereinafter described to the extent of one hundred feet from each side of the center line of its track by constructing its said railroad over and across said premises or otherwise, or at all, and deny that the plaintiff acquired any right of way whatsoever over and across the premises therein described by constructing its said railroad over and across said premises; admit that thereafter on the 30th day of December, 1909, it filed its said map or profile aforesaid, showing such
29 right of way over, across and through said premises, but deny that said map or profile was ever approved by the Secretary

of the Interior, so as to establish or confirm in plaintiff any right of way over, across or through said premises; admit that the Gila Valley, Globe and Northern Railway Company, and its successor, this plaintiff, have, ever since the 5th of October, 1909, and now is operating its trains over and across said premises, but deny that ever since said date the said Gila Valley, Globe and Northern Railway Company, or its successor, this plaintiff, have used and enjoyed its said right of way until the defendants herein unlawfully or otherwise seized that portion of said right of way herein described, but allege that the said Gila Valley, Globe and Northern Railway Company and its successor, this plaintiff, have occupied and used a right of way over and across said premises to the extent of about fifty feet in width on each side of the center line thereof. But defendants aver that neither said Gila Valley, Globe and Northern Railway Company, nor its successor, the plaintiff in this action, has now, or ever has had, any right, power or authority to build, maintain or operate any line of railroad over and across said premises and has not nor has ever had any right, title or interest in and to said right of way or any part thereof.

III.

In answering Paragraph II of said second cause of action, defendants deny that on the 5th day of October, 1909, or prior thereto, this plaintiff was seized in fee or possessed or entitled to the pos-
30 session of that certain piece or parcel of land situate in Gila County, State of Arizona, described as follows, to-wit:

That portion of the N. W. ¼ of the S. E. ¼ of Section 30, T. 1 N., R. 15 E., G. & S. R. B. & M., described as follows: Beginning at a point on the east and west center line of Section 30 one hundred thirteen (113) feet west from its intersection with the center of the main line of the Arizona Eastern Railroad Company's extension to Miami, which intersection is at engineer's station 479:72; thence west, along said east and west center line of Section 30, forty-eight and four-tenths (48.4) feet to the north right of way line of said Arizona Eastern Railroad Company; thence westerly by tangent and curves, parallel to and one hundred (100) feet northerly from said center of main line, five hundred forty-three and eight-tenths (543.8) feet to a point opposite engineer's station 486:50; thence southerly radially to said center of main line fifty (50) feet; thence easterly by curves and tangent, parallel to and fifty (50) feet northerly from said center of main line, five hundred forty-six and four-tenths (546.4) feet to a point opposite engineers' station 481:00; thence northerly at right angles, twenty (20) feet; thence easterly parallel to and seventy (70) feet distant from said center of main line, thirty-nine (39) feet to point of beginning, containing 0.64 acres, more or less, said tract being marked (1) and colored red upon blue print annexed
31 to plaintiff's complaint and marked exhibit "A."

And, beginning at a point on the above mentioned east and west center line of Section 30 eighty and seven-tenths (80.7) feet east of its intersection with the above mentioned center of main line; thence east along said east and west center line of Section 30, eighty

and seven-tenths (80.7) feet to the south right of way line of said Arizona Eastern Railroad Company; thence westerly by tangent and curves parallel to and one hundred (100) feet southerly from said center of main line thirteen hundred three and six-tenths (1303.6) feet to a point on the north and south center line of Section 30; thence north, along said north and south center line, fifty-five (55) feet to a point fifty (50) feet radially from said center of main line; thence easterly by curves and tangent parallel to and fifty (50) feet southerly from said center of main line twelve hundred four and eight-tenths (1204.8) feet to point of beginning, containing 1.44 acres, more or less, said tract being marked (2) and colored red upon blue print annexed to plaintiff's complaint and marked exhibit "A."

Also, beginning at a point on the north right of way line of the Arizona Eastern Railroad Company radially opposite engineer's station 486:50; thence westerly by curves parallel to and one hundred (100) feet northerly from the center of the main line
32 of said Arizona Eastern Railroad Company three hundred and four (304) feet; thence south thirty-six degrees eighteen minutes (36 deg. 18 min.) east, twenty-eight and three-tenths (28.3) feet to a point seventy-two (72) feet northerly from and radially opposite engineer's station 489:61 of said center of main line; thence easterly three hundred three (303) feet to a point seventy-nine and three-tenths (79.3) feet northerly from and radially opposite engineer's station 486:50 of said center of main line; thence northerly radially to said center of main line twenty and seven-tenths (20.7) feet to place of beginning, containing 0.15 acres, more or less, said tract being marked (3) and colored yellow upon the blue print annexed to plaintiff's complaint and marked exhibit "A."

IV.

Answering Paragraph III of said second cause of action, defendants admit that they entered into possession of the demanded premises and still hold the same, but deny that plaintiff was then or has at any time ever been seized of the fee to said premises and deny that defendants entered into possession of said premises without right or title, or ejected plaintiff therefrom and deny that they now unlawfully withhold the possession thereof from plaintiff and further deny that the plaintiff has been damaged in the sum of one hundred ($100.00) Dollars, or in any other sum of money, or at all, by any act of defendants.

V.

33 In answering Paragraph IV of said second cause of action, defendants deny that the value of the rents, issues and profits of said premises from said 22nd day of December 1909, and while the plaintiff has been excluded therefrom by the defendants, is $100.00 or any other sum of money or at all.

Further answering said second cause of action, and as a further defense thereto, the defendants re-allege and re-aver each and every allegation contained in paragraph VI, VII, VIII, and IX of their

second amended answer to plaintiff's first cause of action herein, as a part of their answer to said second cause of action.

Wherefore, defendants pray that plaintiff take nothing by reason of its first and second causes of action set forth in its said complaint, and that defendants have judgment against plaintiff for their costs herein expended.

F. C. JACOBS,
SLOAN & WESTERVELT,
Attorneys for Defendants.

Cross-complaint.

Now comes the defendant, Cleve W. Van Dyke, and as and for a cross complaint against the plaintiff, Arizona Eastern Railroad Company, a corporation, states and alleges:

I.

That the defendant and cross-complainant, Cleve W. Van
34 Dyke, is a resident of the County of Gila, State of Arizona, and that the plaintiff (defendant in said cross complaint), Arizona Eastern Railroad Company, is a corporation organized under the laws of the State of Arizona.

II.

That on the 22nd day of December, 1909, the said cross-complainant, Cleve W. Van Dyke, made his certain application for homestead and entered the same in the local land office at Phœnix, Arizona, which application and homestead entry embraced the S. W. ¼ of Section 30, T. 1 N., R. 15 E., G. & S. R. B. & M.; that said Cleve W. Van Dyke, prior thereto, had entered, settled upon and improved said land above described, constructed buildings thereon, and has lived and resided thereon, together with his family, continuously since said time and up to the present time; that the said Cleve W. Van Dyke made full compliance with the laws of the United States and of the Land Department in reference to settlement and homestead entry upon public lands; that on the 19th day of February, 1912, having fully complied with said laws and regulations, the said Cleve W. Van Dyke received of and from the United States a patent to said land conveying the same to the said Cleve W. Van Dyke in fee; that since said 22nd day of December, 1909, the said Cleve W. Van Dyke has been the owner, entitled to the possession and in possession and occupying said S. E. ¼ of Section 30, T. 1 N., R. 15 E., G. & S. R. B. & M.; that said land is situated in Gila County, State of Arizona.

35 III.

That the said Arizona Eastern Railroad Company claims an estate or interest in said land or some portion thereof adverse to this cross

complainant, and that the claim of the said Arizona Eastern Railroad Company is without any right whatever and the said Arizona Eastern Railroad Company has no estate right, title or interest whatever in said land and premises, or any part thereof.

Wherefore, this cross complainant prays that the said Arizona Eastern Railroad Company may be required to set forth the nature and extent of its said claim and that all adverse claims of said Arizona Eastern Railroad Company may be determined by a decree of this court, and that by said decree it be declared and adjudged that the said Arizona Eastern Railroad Company has no estate or interest whatever in or to said land and premises adverse to this cross complainant and that this cross complainant's title thereto is good and valid and that said Arizona Eastern Railroad Company, and all persons claiming under it, be forever enjoined and debarred from asserting any claim in or to said land or premises adverse to this cross complainant, and for such other and further relief as to this honorable court may seem meet in the premises.

F. C. JACOBS,
SLOAN & WESTERVELT,
Attorney- for Cross Complainant.

36 STATE OF ARIZONA,
County of Gila, ss:

Cleve W. Van Dyke, one of the above named defendants, being first duly sworn, deposes and says: That he is one of the defendants above named; that he has read the above and foregoing second amended answer to plaintiff's first and second causes of action in its complaint herein, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to such matters, be believes it to be true.

CLEVE W. VAN DYKE.

Subscribed and sworn to before me this 15th day of May, 1914.
[SEAL.] EUGENE W. MILLER,
Notary Public.

My commission expires March 7th, 1918.

Filed May 16, 1914.

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This cause having been regularly called for trial before the Court, a jury having been expressly waived by the parties hereto, Rawlins & Little, of Globe, appearing as attorneys for the plaintiff, and F. C. Jacobs, of Globe, and Sloan and Westervelt, of

Phœnix appearing as attorneys for defendants, the Court having heard the proofs of the respective parties and having con-
37 sidered the same and the arguments of respective counsel thereon, and the case having been submitted to the Court for its decision, and being fully advised, now finds the following facts:

1. That plaintiff, the Arizona Eastern Railroad Company, is a railroad corporation, organized in the manner and form as set forth in the complaint, and that plaintiff, said Arizona Eastern Railroad Company, succeeded to all the rights, property, franchises, rights-of-way, and all other assets of the Gila Valley, Globe & Northern Railway Company and the other railway companies set forth in its complaint, by reason of consolidation as contained in paragraphs one and two of the said complaint.

2. The Court finds that the said Arizona Eastern Railroad Company, at the time of the construction of the Globe-Miami extension, had the right, power and authority to construct said line of railroad from the city of Globe to the town of Miami over the unappropriated public domain of the United States.

3. That during the month of March, 1906, the said Arizona Eastern Railroad Company, under and by virtue of an Act of Congress approved March 3rd 1875, surveyed and platted its line of railroad from Globe to Miami, Arizona, passing over and across certain public lands of the United States Government and into, upon and over a portion of the Crook National Forest Reserve; that on the fifth day of November, 1908, plaintiff filed in the United
38 States Land Office, at Phœnix, Arizona, its map or profile showing its line of railroad duly platted and marked on said map or profile; that thereafter on the nineteenth day of April, 1909, written permission to enter upon and construct said railroad in and upon said Forest Reserve was filed with the Department of Agriculture, Forest Service of the United States Government, and thereafter, on the sixth day of July, 1909, permission and authority was obtained from the said Forest Service in writing permitting this plaintiff to go into, over and upon the said Crook National Forest Reserve and to locate and to construct its said railroad therein and thereon; that thereafter, on the 21st day of September, 1909, said map or profile was duly approved by the Secretary of the Interior under said Act of Congress approved March 3rd 1875, and the plaintiff commenced the construction of its said railroad from Globe to Miami, Arizona, in April, 1909, and continued such construction until the whole was completed in September, 1909.

4. That thereafter plaintiff amended its said survey and changed the course of its said railroad to cross into, over and upon the lands described in plaintiff's complaint, and in the months of November and December, 1908, plaintiff marked and staked its said line of railroad and right-of-way on the ground along the entire length of said premises described in plaintiff's complaint filed herein, to extend one hundred feet on each side of said center line as provided

for by said Act of Congress, and did, during the months of
39 August and September, 1909, complete the construction of its said railroad over and across said premises as staked and marked on the ground and on the line of said amended survey.

5. That at the time of the said survey in 1908 and at all times during 1909, up until about the month of November, 1909, the said land in controversy described in plaintiff's complaint was public lands regularly located as mineral lands and held by a corporation known as the Miami Land & Improvement Company as such, and that September 27th, 1909, the said plaintiff took from the said Miami Land & Improvement Company a deed to a right-of-way across the land in question to fifty feet upon each side of the center of its line of track.

6. That plaintiff, on the fifth day of October, 1909, after said road was constructed, commenced to operate its trains upon and over its said railroad so surveyed, located and constructed as aforesaid, and ever since said date continued to so run and operate its trains over and upon its said road so surveyed, located and constructed as aforesaid.

7. The Court further finds that in 1908, and prior to the surveys hereinbefore mentioned, by an executive order of the President of the United States, duly given and made, a National Forest Reserve, known as the Crook National Forest was created in said County of Gila, then Territory of Arizona, which Forest Reserve included within its boundaries as a part thereof the lands described in plaintiff's complaint.

8. That thereafter, on the thirtieth day of December, 1909,
40 the plaintiff filed its amended map or profile in the United States Land Office at Phœnix, Arizona, which said amended map or profile was thereafter approved by the Department of Agriculture, Forest Service of the United States, and it was thereafter approved on the fourth day of March, 1911, by the Secretary of the Interior under and by virtue of said Act of Congress.

9. That pursuant to an executive order duly issued by the President of the United States on August 27th, 1909, reducing and segregating the lands described in plaintiff's complaint, together with other lands, from the Crook National Forest for settlement and homestead entry under the homestead laws of the United States, not embraced in any other withdrawal, reservation or appropriation, the Secretary of the Interior did on the 22nd day of November, 1909, reduce said Crook National Forest by segregating the lands described in said executive order from the said National Reserve, and did open the said lands for settlement on and after the 22nd day of November, 1909, and for entry, filing and selecting on and after the 22nd day of December, 1909.

10. That at the time of the making of said order of segregation, the said Cleve W. Van Dyke, the defendant herein, was actually occupying the lands in controversy; that such actual occupancy by the said Cleve W. Van Dyke was made while the lands were yet within the said Crook National Forest and while the same were held and

claimed as mineral claims by said Miami Land & Improve-
41 ment Company. Such occupancy was with the knowledge of the Forest Supervisor of the Crook National Forest.

11. That the defendant, Cleve W. Van Dyke, on the 22nd day of December, 1909, filed in the United States Land Office at Phœnix, Arizona, his application for homestead entry, which included the quarter sections over which plaintiff had surveyed, marked, staked and constructed its said railroad, and over which plaintiff, at the time of said filing, and prior thereto, was running and operating its trains, which application was approved and thereafter, on the 12th day of February, 1912, a patent was issued to the said defendant, Cleve W. Van Dyke, for the quarter sections of land over and upon which plaintiff had prior thereto constructed its said road, and which said patent contained no reservation of any right, claim or interest to the land included therein or any part thereof on the part of the plaintiff or of any person or corporation.

12. That at the time plaintiff entered upon said premises and surveyed, staked and constructed its said railroad, said premises were held under mining locations and were owned and held by the Miami Land & Improvement Company and not by the defendants or either of them, and the said plaintiff acquired by deed dated September 27th, 1909, a right-of-way through the said mining claims to the extent of fifty feet upon either side of the center of its line of track; and that at the time of the taking of such deed the said Cleve W.

Van Dyke was in the actual possession of the land as herein-
42 before set forth, and had valuable improvements thereon under and by virtue of an option from the owner of said mining claims.

As a conclusion of law from the foregoing facts, the Court finds:

1. That the plaintiff is the owner in fee and entitled to the possession of all the premises described in plaintiff's complaint filed herein as against the defendants, all and severally, and all persons claiming or to claim the same or any part of said premises under authority of said defendants, or any of them, and that none of said defendants have any right, title or interest in or to said premises or any part thereof.

2. That plaintiff is entitled to a decree as prayed for in its complaint to quiet its title to said premises and to the possession thereof and against said defendants and each of them, and all persons claiming or to claim the same or any part thereof, under or through said defendants or either of them.

And judgment is ordered to be entered accordingly.

Done in open court this twelfth day of September, 1914.

G. W. SHUTE,
Superior Judge.

Filed Nov. 21, 1914, as of the date of judgment.

43 [Title of Court and Cause.]

Request of Defendants for Findings of Fact.

Come now the defendants in the above entitled cause and move the Court to make the following fiindings of fact:

Findings of Fact.

1.

The court finds that the plaintiff, the Arizona Eastern Railroad Company, by the filing of its articles of incorporation in the office of the auditor of the Territory of Arizona on the first day of February, 1910, became a corporation under the laws of Arizona for the purpose of constructing, owning, maintaining and operating railroads therein and since its said organization has been engaged in the railroad business as a common carrier, as alleged in Paragraph 1 of plaintiff's complaint. That under and by virtue of said articles of incorporation said plaintiff on said first day of February, 1910, became the successor in interst of a corporation known as the Gila Valley, Globe & Northern Railroad Company and organized under and by virtue of the laws of the Territory of Arizona on the first day of October, 1896, and as such successor in interest of said railroad company became on the first day of February, 1910, the owner of all of its property, rights, franchises, rights of way and assets of every kind and description.

Refused—G. W. Shute.

44 2.

The court finds that under the said articles of incorporation of said Gila Valley, Globe & Northern Railroad Company said Company was authorized and empowered to construct, maintain and operate a railroad "to run from a point on the Southern Pacific Railroad at or near Bowie Station in Cochise County, Territory of Arizona, into or pass through the counties of Cochise, Graham and Gila on the most direct route from the town of Globe in the said Gila County, Territory of Arizona, and to build, maintain and operate branch lines commencing at a point on said main line of said railroad at or near San Carlos and running thence in a general southeasterly direction to a point at or near the mouth of San Pedro River in the County of Pinal and a further branch line commencing at some convenient point on the said above mentioned branch line east of Dripping Springs Wash and crossing the Gila River to some convenient point on the Arizona Eastern Railroad." That prior to 1909 the said Gila Valley, Globe & Northern Railroad did build, maintain and construct the line of railroad described in its said articles of incorporation from said Bowie Station in Cochise County to the town of Globe in the said Gila County. That the

said Gila Valley, Globe & Northern Railroad was never at any time authorized or empowered under its articles of incorporation or any amendments thereto to build maintain or operate any railroad or branch line other than as herein above set forth.

Refused—G. W. Shute.

45 3.

The court further finds that the right of way set forth and described in the complaint is not a part of the road set forth and described in the articles of incorporation of the Gila Valley, Globe & Northern Railroad Company or in any amendment thereto, or of any branch line therein described or referred to, but constitutes a part of a branch line of railroad running from the town of Globe to the town of Miami in said County of Gila not described or referred to in said articles of incorporation or any amendment thereto.

Refused—G. W. Shute.

4.

The court further finds that the plaintiff company claims title to the right of way set forth and described in plaintiff's complaint solely by virtue of the rights to the same which may have been acquired by said Gila Valley, Globe & Northern Railroad Company prior to said first day of February, 1910.

Refused, G. W. Shute.

5.

The court further finds that on the — day of ——, 1908, by executive order of the president of the United States, duly given and made, a National Forest Reserve known as the Crook National Forest was created in the said County of Gila, then Territory of Arizona, which forest reserve included within its boundaries as part thereof the land described in plaintiff's complaint.

Refused—G. W. Shute.

46 6.

The court further finds that the defendant, Cleve W. Van Dyke, with the bona fide intent of entering the same as a homestead under the laws of the United States, on the 26th day of July, 1909, in the manner and form prescribed by law and the rules of the Department of Agriculture, filed application in the said Department at Washington for listing and segregation under the Act of Congress of June 11, 1906, of the S. E. ¼ of the S. W. ¼, S. W. ¼ of the S. E. ¼, N. W. ¼ of the S. E. ¼, Section 30, T. 1, N. R. 15 E., G. & S. R. B. M., which land includes the right of way described and set forth in the complaint, and at the time of said application did obtain from the District Forester at Safford, Arizona, a special verbal use permit authorizing him to occupy, possess and improve

said land described in said application. That under said verbal special use permit said defendant Van Dyke did occupy and take possession of said land, did improve the same, construct buildings thereon and live and reside thereon. That thereafter pending the said application for the examination and listing of said lands, the President of the United States, on, to-wit, the 27th day of August, 1909, by executive order duly given and made, ordered a tract of land including the lands so described in plaintiff's said application, segregated from said Crook National Forest and opened for settlement and homestead entry. That on the 22nd day of November, 1909, the Secretary of the Interior, pursuant, to said executive order of the President, did reduce said Crook National Forest by
47 the segregation of the land described in said executive order from said forest reserve and did open the same to settlement and homestead entry, to take effect on the 22nd day of December, 1909. That under and by virtue of said executive order of the President made on said 27th day of August, 1909, no rights were permitted thereafter to be instituted or acquired in and to the land so segregated until said land should be opened for settlement and homestead entry, to wit, on said 22nd day of December, 1909.

Refused—G. W. Shute.

7.

The court further finds that on said December 22, 1909, the defendant, Cleve W. Van Dyke, then and theretofore since the said 26th day of July, 1909, having been in the possession and occupancy of the same under and by virtue of his application for listing and segregation as aforesaid, did file in the United States Land Office at Phœnix, Arizona, his application for a homestead entry which included the lands hereinbefore described, which said application was allowed. That the defendant, Cleve W. Van Dyke, did, after making said homestead entry as aforesaid, continue to occupy, cultivate and improve said land and reside thereon, together with his family, continuously since said time and up to the present date. That on the 19th day of February, 1912, the President of the United States executed and issued to the defendant, Cleve W. Van Dyke, United States patent conveying under said homestead entry
48 the land included therein to said defendant Cleve W. Van Dyke.

Refused—G. W. Shute.

8.

The court further finds that the said Gila Valley, Globe & Northern Railroad Company, for the purpose of surveying and constructing a railroad upon, over and across the same, entered upon said premises included within the land described and set forth in the application so made by Cleve W. Van Dyke for listing and segregation and subsequently included within the homestead entry so made by said Van Dyke and conveyed as aforesaid by the United States to said Cleve W. Van Dyke under said United States patent.

That said entry was made on or about the — day of August, 1909. That between said date and the 5th day of October, 1909, said railroad built its road over and across said land on the line as described and set forth in the complaint, and ever since said last date said railroad company and its successor in interest, said plaintiff, has operated the same. That when said railroad entered upon said land as aforesaid, the said Cleve W. Van Dyke was a settler and locator in good faith thereon for the purpose of obtaining title thereto under the homestead laws of the United States as soon as the same should be segregated and opened for settlement under his said application.

Refused—G. W. Shute.

49 9.

That prior to the application of said defendant Van Dyke for the listing and segregation of said lands, to-wit, on the 19th day of December, 1908, a corporation known as the Miami Land & Improvement Company claimed title to the land embraced within said homestead entry of said Van Dyke by virtue of location made under the mineral laws of the United States. That on said date the said Miami Land & Improvement Company contracted in writing to convey said land to said Van Dyke and on said date placed a deed to said land in escrow to be subsequently delivered. That the said Gila Valley, Globe & Northern Railroad Company, with a knowledge of the location of said mining claims and of the said agreement and the said conveyance from said Mining Company to said Van Dyke, obtained a deed of a right of way across said land from said Miami Land & Improvement Company, which said conveyance was made with the consent and approval of defendant. That said right of way so conveyed did not include any of the land described and set forth in plaintiff's complaint, being a strip of land approximately 50 feet on each side of the center of the road bed as surveyed and constructed by said company instead of 100 feet on each side of said center of said road bed as now claimed by said company. That the entry upon said land by said railroad company under said deed and its construction of its road over and across the right of way therein described was with the knowledge, acquiescence and consent of the defendant, Cleve W. Van
50 Dyke. That the said defendant, Cleve W. Van Dyke, did not at the time of said entry or at any time since, acquiesce in any claim of right made by said railroad company to the land set forth and described in plaintiff's complaint but the same has always been and now is claimed by defendant as a part of his homestead entry conveyed to him by patent aforesaid. That at the time said railroad company entered upon said land and constructed its road across the same it made no claim to any land in excess of that conveyed in said deed

Refused—G. W. Shute.

10.

The court further finds that on the 30th day of December, 1909, the said Gila Valley, Globe & Northern Railroad Company filed with the Secretary of the Interior its map of location of its proposed line of railroad over and across the said homestead entry of defendant and did file with said secretary at the same time copy of its articles of incorporation and due proof of its organization under the same. That thereafter, to-wit, on the — day of February, 1910, the said Secretary of the Interior approved said map, showing the right of way over the lands in controversy.

Refused—G. W. Shute.

11.

The court further finds that since the 5th day of October, 1909, the said Gila Valley, Globe & Northern Railroad Company and its successor, the plaintiff herein, has been operating trains over
51 and across the premises described in said complaint and has used and enjoyed a right of way commensurate only to that set forth and described in said deed from the Miami Land & Improvement Company to said Railroad Company.

Refused—G. W. Shute.

12.

The court further finds that at the time the said Gila Valley, Globe & Northern Railroad Company constructed its road over and across the said land it had not made any application to the Forestry Department of the United States or to the Secretary of the Interior, or to any other department of the government, or to any other person or official, for a permit or privilege to construct said road over and across said forest reserve or any part thereof.

Refused—G. W. Shute.

SLOAN & WESTERVELT,
F. C. JACOBS,
Attorneys for Defendants.

Filed Nov. 30th, 1914.

[Title of Court and Cause.]

Request for Findings.

Now come the defendants and move the Court to make and enter its finding as follows

The Court finds that the Gila Valley, Globe & Northern Railroad, predecessor in interest of the plaintiff, was never at any time authorized or empowered by its articles of incorporation, or any
52 amendment thereto, to build, maintain, or operate a railroad or branch line of railroad from the town of Globe to the

Town of Miami and hence over and across the lands described in the complaint and in controversy in this action.

Refused—G. W. Shute.

Filed Nov. 16th, 1914.

[Title of Court and Cause.]

Judgment.

This cause came on regularly for trial on this 25th day of May, 1914, to the Court without a jury, Rawlins & Little appearing as attorneys for the Arizona Eastern Railroad Company, plaintiff herein, and Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and Patrick H. McGuire, defendants herein, appeared by their attorneys, F. C. Jacobs, and Sloan & Westervelt, and the said plaintiff and the said defendants offered evidence both oral and documentary, and at the close of the trial the matter was submitted to the Court for its decision, and thereafter, and on the date hereof, after due deliberation, the court delivers its findings, in writing, which *is* filed, and orders that judgment *to* entered in accordance therewith. Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff herein have judgment against the defendants, and each of them, as follows:

1. That the plaintiff is the true and lawful owner in fee and entitled to the possession of the premises and every part and
53 parcel thereof described in the complaint and hereinafter described, and that plaintiff have and recover the possession thereof.

2. That the defendant, Cleve W. Van Dyke, take nothing by his cross-complaint herein.

3. That all adverse claims of the defendants, and each of them, and all persons claiming or to claim premises, or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiff be and it is hereby decreed and adjudged to be the true and lawful owner of said premises, and that plaintiff's title thereto is hereby adjudged to be quieted against all claims, demands, or pretensions of the said defendants, or either of them, who are hereby perpetually estopped and enjoined from setting up any claims thereto or any part thereof. Said premises are bounded and described as follows, towit:

That portion of the N. W. ¼ of the S. E. ¼ of Section 30, T. 1 N., R. 15 E., G. & S. R. B. & M., as follows: That portion of the two hundred (200) foot trip of right of way of the Arizona Eastern Railroad Company at Miami, more particularly described as follows: Beginning at a point on the east and west center line of Section 30, one hundred thirteen (113) feet west from its intersection with the center of the main line of the Arizona Eastern Railroad Company's

extension to Miami, which intersection is at engineer's sta-
54 tion 479:72; thence west, along the said east and west center line of Section 30, forty-eight and four-tenths (48.4) feet to the north right of way line of said Arizona Eastern Railroad Company; thence westerly by tangent and curves along said north right of way line, which is parallel to and one hundred (100) feet northerly from said center of main line, five hundred forty-three and eight-tenths (543.8) feet to a point opposite engineer's station 486:50; thence southerly radially to said center of main line fifty (50) feet; thence easterly by curves and tangent, parallel to and fifty (50) feet northerly from said center of main line, five hundred forty-six and four-tenths (546.4) feet to a point opposite engineer's station 481:00; thence northerly at right angles, twenty (20) feet; thence easterly, parallel to and seventy (70) feet distant from said center of main line, thirty-nine (39) feet to point of beginning, containing 0.64 acres, more or less, said tract being marked (1) and colored red upon blue print, annexed hereto, marked exhibit "A," and made a part hereof.

And, beginning at a point on the above mentioned east and west center line of Section 30, eighty and seven-tenths (80.7) feet east of its intersection with the above mentioned center of main line; thence east along said east and west center line of Section 30, eighty and seven-tenths (80.7) feet to the south right of way line of said Arizona Eastern Railroad Company; thence westerly be tangent and curves along said south right of way line which is parallel to and one hundred (100) feet southerly from said center of mian line
55 thirteen hundred three and six-tenths (1303.6) feet to a point on the north and south center line of Section 30; thence north, along said north and south center line, fifty-five (55) feet to a point fifty (50) feet radially from said center of main line; thence easterly by curves and tangent parallel to and fifty (50) feet southerly from said center of main line twelve hundred four and eight-tenths (1204.8) feet to point of beginning, containing 1.44 acres, more or less, said tract being marked (2) and colored red upon blue print annexed hereto, marked exhibit "A," and made a part hereof.

Also, that portion of the two hundred (200) foot trip of right of way of the Arizona Eastern Railroad Company, at Miami, more particularly described as follows: Beginning at a point on the north right of way line of the Arizona Eastern Railroad Company radially opposite engineer's station 486:50; thence westerly by curves along said north right of way line which is parallel to and one hundred (100) feet northerly from the center of the main line of said Arizona Eastern Railroad Company three hundred and four (304) feet; thence south thirty-six degrees eighteen minutes (36 deg. 18 min.) east, twenty-eight and three-tenths (28.3) feet to a point seventy-two (72) feet northerly from and radially opposite engineer's station 489:61 of said center of main line; thence easterly three hundred three (303) feet to a point seventy-nine and three-tenths (79.3) northerly from and radially opposite engineer's

station 486:50 of said center of main line; thence northerly
56 radially to said center of main line twenty and seven-tenths (20.7) feet to place of beginning, containing 0.15 acres, more or less, said tract being marked (3) and colored yellow upon the blue print, annexed to this complaint and made a part hereof, and marked exhibit "A."

All of the property hereinbefore described is situate in Gila County, State of Arizona.

And it is hereby further ordered, adjudged and decreed that the plaintiff do have and recover its costs herein, taxed at $—, against defendants.

It is further ordered that plaintiff have execution for the amount of its costs taxed herein, and a writ for the possession of said premises and every part and parcel thereof.

Done in open Court this 12th day of September, 1914.

G. W. SHUTE, *Judge.*

Filed Nov. 23, 1914, 11:45 a. m.

[The same map is attached to this judgment as is attached to the complaint and marked exhibit "A."]

[Title of Court and Cause.]

Amended Motion for New Trial.

Come now the defendants above named and move the court to vacate its decision, judgment and decree and to grant a new trial herein upon the following grounds, to-wit:

57 1.

Because of errors of law occurring at the trial of the above entitled action.

2.

Because the court erred in admitting evidence offered by the plaintiff at the trial and objected to by defendants.

3.

Because the court erred in refusing to admit evidence offered by the defendants and objected to by the plaintiff.

4.

Because the judgment is not sustained by the evidence in the case and is contrary to law.

5.

Because the judgment is not sustained by the findings and is contrary to law.

6.

Because the findings of fact made by the Court and numbered 2, 3, 4, 6, 8, and 11 are not sustained by the evidence.

7.

Because the finding that the "Arizona Eastern Railroad Company at the time of the construction of the Globe-Miami extension had the right, power and authority to construct said line of railroad from the city of Globe to the town of Miami over the unappropriated public domain of the United States" is unsupported by the evidence in that the uncontradicted proof was that at the time of the construction of the line of railroad from the city of Globe to the town of Miami, said Arizona Eastern Railroad Company was not in existence and, further, that its predecessor in interest, the Gila Valley, Globe
58 & Northern Railroad Company, at the time of the construction of said line of railroad from the said city of Globe to the said town of Miami had not been, was not then, and was at no time organized for the purpose of constructing said line of railroad and its articles of incorporation did not describe, refer to or include said line of railroad or any part thereof and hence neither said Arizona Eastern Railroad Company, nor its predecessor in interest, the Gila Valley, Globe & Northern Railroad Company, possessed the right, power or authority, either to construct said road or to acquire the right of way in controversy under the Act of Congress of 1875, or any amendment thereto.

8.

Because the finding that "During the month of March, 1906, the said Arizona Eastern Railroad Company, under and by virtue of an Act of Congress approved March 3rd, 1875, surveyed and platted its line of railroad from Globe to Miai, Arizona, passing over and across certain public lands of the United States Government and into, upon the over a portion of the Crook National Forest Reserve; that on the fifth day of November, 1908, plaintiff filed in the United States Land Office at Phœnix, Arizona, its map or profile showing its line of railroad duly platted and marked on said map or profile; that thereafter on the nineteenth day of April, 1909, written permission to enter upon and construct said railroad in and upon said Forest Reserve was filed with the Department of Agriculture, Forest Service of the United States Government,
59 and thereafter, on the sixth day of July, 1909, permission and authority was obtained from the said Forest Service in writing permitting this plaintiff to go into, over and upon said Crook National Forest Reserve and to locate and to construct its

said railroad therein and thereon; that thereafter, on the 21st day of September, 1909, said map or profile was duly approved by the Secretary of the Interior under said Act of Congress approved March 3rd, 1875, and commenced the construction of its said railroad from Globe to Miami, Arizona, in April 1909 and continued such construction until the whole was completed in September, 1909," is unsupported by the evidence in that the undisputed evidence shows that the Arizona Eastern Railroad Company was not in existence during any of the time or times covered by said findings and that there was no evidence showing or tending to show that said Arizona Eastern Railroad Company, or its predecessor in interest, the Gila Valley, Globe & Northern Railroad Company, ever obtained from the Forest Service of the United States a written or other permit to go into, over and upon the said Crook National Forest Reserve and to locate and construct its railroad therein and thereon. And, further, that the evidence does not show that the map referred to in said finding, or any map, was duly approved by the Secretary of the Interior on the 21st day of September, 1909; and further that the evidence affirmatively shows that the line of railroad mentioned was not constructed and completed in September, 1909, but the evidence does affirmatively show that it was
60 completed or on about the 5th day of October, 1909.

9.

Because the finding that "thereafter plaintiff amended its said survey and changed the course of its said railroad to cross into, over and upon the lands described in plaintiff's complaint, and in the months of November and December, 1908, plaintiff marked and staked its said line of railroad and right of way on the ground along the entire length of said premises described in plaintiff's complaint filed herein to extend one hundred feet on each side of said center line as provided for by said Act of Congress, and did, during the months of August and September, 1909, complete the construction of its said railroad over and across said premises as staked and marked on the ground and on the line of said amended survey;" is unsupported by the evidence in that the undisputed evidence was that plaintiff was not then organized as a corporation and further that the undisputed evidence shows that the construction of said railroad over and across said premises was not completed until on or about the 5th day of October, 1909; and further that there is no evidence showing such marking and staking of said line of railroad and right of way on the part of its predecessor, the Gila Valley, Globe & Northern Railroad Company.

10.

Because findings of the court numbered 6, 8 and 11 are not supported by the evidence in that the undisputed evidence
61 was that each of the things recited therein as having been done by the plaintiff prior to February, 1910, were done

and performed before plaintiff was incorporated and before it had any existence.

11.

Because the court erred in failing to find, as requested by defendant, that the "Gila Valley, Globe & Northern Railroad, the predecessor in interest of the plaintiff, was never at any time authorized or empowered by its articles of incorporation, or any amendment thereto, to build, maintain, or operate a railroad or branch line of railroad from the town of Globe to the town of Miami and hence over and across the lands described in the complaint and in controversy in this action," for the reasons, first, because the power and authority of said railroad to build, maintain or operate said railroad or branch line was a material issue under the pleadings; second, because the undisputed evidence was that said Gila Valley, Globe & Northern Railroad Company, by its articles of incorporation and amendments thereto, was organized for the sole purpose of constructing, maintaining and operating a railroad "to run from a point on the Southern Pacific Railroad at or near Bowie Station in Cochise County, Territory of Arizona, into and to pass through the counties of Cochise, Graham, and Gila on the most direct route to the town of Globe in the said Gila County, Territory of Arizona, and to build, maintain and operate branch lines, commencing at a point on said main line of said rail-
62 road at or near San Carlos and running thence in a general southeasterly direction to a point at or near the mouth of San Pedro River in the County of Pinal and a further branch line commencing at some convenient point on the said above mentioned branch line east of Dripping Springs Wash and crossing the Gila River to some convenient point on the Arizona Eastern Railroad," and that under said articles of incorporation and amendments thereto said railroad company was never at any time authorized and empowered to construct a railroad or branch line of railroad from Globe to the town of Miami, and hence could not lawfully acquire, under the Act of Congress approved March 3rd, 1875, a right of way for said railroad or branch line of railroad across the public domain of the United States and particularly across and over the lands in controversy.

12.

Because the court erred in refusing to find, as requested by the defendants, that "the defendant, Cleve W. Van Dyke, with the bona fide intent of entering the same as a homestead under the laws of the United States, on the 26th day of July, 1909, in the manner and form described by law and the rules of the Department of Agriculture, filed application in the said department at Washington, for the segregation under the act of Congress of June 11, 1906, of the south east ¼ of the S. W. ¼, S. W. ¼ of the S. E. ¼, N. W. ¼ of the S. E. ¼, Section 30, Tp. 1. N. R. 15 East,

G. S. R. B. & M., being the land subsequently conveyed to said Van Dyke by patent and including the land described and
63 set forth in the complaint and in controversy in this action, and at the time of said application did obtain from the District Forester at Safford, Arizona, a verbal special use permit under the rules and regulations of the Department authorizing him to occupy, possess and improve said land described in said application. That under said verbal special use permit, said defendant, Van Dyke, did occupy and take possession of said land and did improve the same and did construct buildings thereon and has continued to live and reside thereon ever since."

13.

Because the court erred in its conclusion of law that plaintiff is the owner in fee and entitled to the possession of all the premises described in plaintiff's complaint and that none of the defendants have any right, title or interest in and to said premises or any part thereof, for the reasons, first, that the evidence does not sustain the findings upon which the court based such conclusion of law, and second, that the findings as made by the court do not sustain said conclusion of law.

14.

Because the court erred in its conclusion of law that the plaintiff was entitled to a decree as prayed for in its complaint for the reason that the evidence does not sustain the findings as made by the court and said findings are contrary to the evidence and, further, said findings as made by the court do not support said conclusion of law.

64 Wherefore, defendants pray that the judgment of the court rendered herein be set aside and vacated and a new trial granted.

F. C. JACOBS,
SLOAN & WESTERVELT,
Attorneys for Defendants.

Filed Nov. 24th, 1914, at 2:15 p. m.

[Title of Court and Cause.]

Notice of Appeal.

Notice is hereby given that the above named defendants, Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and Patrick H. McGuire, appeal to the Supreme Court of the State of Arizona from the judgment rendered in said Court in the above entitled cause on the 12th day of September, 1914, in favor of the above named Arizona Eastern Railroad Company, a corporation, plaintiff, and against the said Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and

Patrick H. McGuire, defendants, and from the whole thereof; and

Notice is likewise given that the above named defendants appeal from the order overruling their motion for a new trial in said above entitled cause made and entered on the 30th day of November, 1914, to the said Supreme Court of the State of Arizona.

SLOAN & WESTERVELT,
F. C. JACOBS,
Attorneys for Defendants.

Filed January 2nd, 1915.

65 In the Superior Court, Gila County, State of Arizona.

No. 451-B.

ARIZONA EASTERN RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
CLEVE W. VAN DYKE and IDA A. VAN DYKE, His Wife, and PATRICK H. MCGUIRE, Defendants.

Bill of Exceptions.

Be it remembered that the above entitled cause came on to be tried in the above entitled court on the 25th day of May, 1914, the Judge of said court hearing the same without a jury, whereupon the following proceedings were had:

The plaintiff to sustain the allegations of its complaint offered in evidence a certified copy of the articles of incorporation of the Arizona Eastern Railroad Company. To the introduction of said articles of incorporation counsel for the defendants objected
66 on the ground that the said articles contain no authorization, no description of any road or roads, or any branch road or station which by any possibility could have reference to the ground in controversy in the case at or prior to the time when under the pleadings in the case the rights of the plaintiff accrued. Whereupon the Court overruled the objection, and the said articles of incorporation were received in evidence and marked "Plaintiff's Exhibit 1," a copy of which is hereto annexed and made a part of this bill of exceptions, marked "Exhibit 1." To the ruling of the Court admitting said articles of incorporation the defendants then and there duly excepted.

The plaintiff, to still further sustain the allegations of its complaint, then offered in evidence a map showing the original survey of the Gila Valley, Globe & Northern Railway Company, and purporting to have been filed in the Local Land Office at Phoenix, Arizona, November 5, 1908, and approved by the Secretary of the Interior September 21, 1909.

To the introduction of said map the counsel for the defendants objected on the grounds that it was irrelevant, immaterial and incompetent, and that it seemed to have been approved in 1909, and further that it appeared to be a map of an amended definite location

and did not describe a road, railroad, roadway or right of way passing through the S. E. ¼ of Section 30, Township 1 North, Range 15 East, Gila and Salt River Meridian, the land involved in this action, but described a right of way or roadway to a railroad
67 passing through the N. E., N. W. and S. W. quarters of Section 30, and not through the land involved in this action; and on the further ground that there is no authority shown by the plaintiff in the Gila Valley, Globe and Northern Railway, the predecessor of the plaintiff in this case, or in the plaintiff in this case to extend or construct a line of railroad from the town of Globe, Gila County, Arizona to the town of Miami and over property involved in this action.

Counsel for the plaintiff in offering the map stated that the offer was for the purpose of showing that the Gila Valley, Globe and Northern Railway Company had authority to build a line from Pinal Creek just below the town of Globe into the town of Miami, and that it is a decision of the Secretary of Interior to that effect, and it was not offered for the purpose of showing that the line delineated on that map passed over land in controversy.

It (the map) is offered for showing the right and authority of the Gila Valley, Globe and Northern Railway Company to construct a line of road from Globe to Miami over public lands.

Whereupon the court overruled said objection to the introduction of said map and the same was admitted in evidence and marked "Plaintiff's Exhibit 2," to which ruling of the Court the defendants did then and there except. A copy of said map is hereto annexed and made a part of this bill of exceptions marked "Exhibit 2."

Plaintiff still further to sustain the allegations of its com-
68 plaint then offered in evidence a map purporting to be a map of the amended and located line of Miami Station of the Gila Valley, Globe and Northern Railway, purporting to have been received at the United States Land Office, Phoenix, Arizona, December 30, 1909, and by the Forest Service, Department of Interior, September 28, 1910 and approved by the Secretary of Interior, March 4, 1911, purporting to show the right of way over the lands in controversy together with the declarations claimed by the plaintiff. To the introduction of said amended map the defendants objected upon the ground that it had not been shown that the Gila Valley, Globe and Northern Railway Company was authorized by its charter or articles of incorporation to construct the railroad in question and to acquire the right of way involved in the controversy.

Whereupon the court overruled the objection and the said map was received in evidence and marked "Plaintiff's Exhibit 4;" to which said ruling admitting said map the defendants then and there duly excepted. A copy of which amended map, marked "Exhibit 3," is hereto annexed and made part of this bill of exceptions.

Thereupon plaintiff offered in evidence what purported to be a document from the General Land Office, dated April 19, 1909 containing a letter to the Commissioner of the General Land Office, signed by the Acting Forester, dated May 11, 1908, and a letter

signed by the Acting District Forester to the Commissioner of the General Land Office, dated July 6, 1909. To the introduc-
69 tion of said document the counsel for the defendants objected upon the ground that it did not appear on inspection of the same that it related or any of its contents related in any way, form or manner to the right of way, title to which is involved in this action; and upon the further ground that the document was incompetent, irrelevant and immaterial for any purpose. Thereupon the court overruled said objections and the document was received in evidence and marked "Plaintiff's Exhibit 5," to which said ruling counsel for the defendants then and there excepted; a copy of which said document is hereto annexed and made a part of this bill of exceptions and marked "Exhibit 4."

Thereupon the plaintiff offered in evidence a certified copy of an executive order of the President of the United States, dated August 27, 1909, withdrawing, among other lands, the lands in controversy from the Crook National Forest Reserve. Whereupon the said order was admitted in evidence and marked "Plaintiff's Exhibit 6;" a copy of which said order is hereto annexed and made a part of this bill of exceptions and marked "Exhibit 5."

Thereupon, to still further sustain the allegations made in its complaint, the plaintiff called as a witness on its behalf P. JONES who being duly sworn was examined and testified as follows:

"My name is P. Jones. I live at Tucson. My business is that of civil engineer, and have been in that business for about thirty years. My chief work in connection with civil engineering
70 has been railroading—railroad building and maintenance, and have been engaged in railroad engineering practically all that time. I have been engaged in that business in this state since 1905. I was in the employment of the Arizona Eastern and the Gila Valley, Globe and Northern. Am acquainted with the road from here to Miami, and surveyed that line for the Gila Valley, Globe and Northern Railway Company. The first survey was made in March, 1906. I first surveyed where the line is now constructed upon the ground in November and December, 1908. It was never changed after it was then surveyed."

Counsel for the plaintiff then asked the witness the following question:

"Was it constructed upon that survey?" To which question the counsel for the defendants objected upon the grounds first, that the question was leading and suggestive, and second, upon the further ground that it did not appear that the plaintiff or its predecessors in interest had any right or authority under its articles of incorporation, or any articles of incorporation, to construct the line in controversy, and that it had not yet appeared from the evidence in the case as to what right of way or portion of right of way was involved in the question, or whether it related to any right of way sought to be quieted in this action, or that it related at all to the right of way

sought to be quieted in the action. Whereupon the court overruled said objection and directed to be answered; to which ruling
71 of the court overruling said objection counsel for the defendants then and there excepted.

Whereupon the witness stated in answer to the question,

"It was constructed upon that survey."

Whereupon counsel for plaintiff, continuing the examination, asked the witness the question:

"I hand you now, Mr. Jones, plaintiff's Exhibit 4 and ask you if the railroad, The Gila Valley, Globe and Northern, was constructed upon the line designated by that map?"

To which said question the defendants objected on the ground that it was leading and suggestive, and upon the further ground that no authority had been shown from the evidence for the construction of a road bed, or the acquisition of a right of way across the lands in controversy by the plaintiff or any of its predecessors in interest and that it does not appear that the said Gila Valley, Globe and Northern Railway Company had any authority by reason of its articles of incorporation, at the time of the survey or the construction of the road, to acquire the right of way in controversy; and further that it had not yet appeared that any permit was granted by the Secretary of Interior to do any work or enter upon any lands in question for the purpose of constructing a railroad at the time referred to in the question. Said objections were then by the court overruled; to which ruling the defendants then and there excepted.

72 Whereupon the witness answered the question as follows:

"As far as the lands in controversy are concerned, yes."

Thereupon counsel for the plaintiff asked witness the following question:

"Q. Now, when did you begin the construction of this railroad over the premises in dispute, the actual construction of it?"

To which question the counsel for the defendants objected upon the same grounds made to the preceding question. Said objections were then by the court overruled; to which ruling counsel for defendants then and there excepted.

Whereupon the witness answered the question as follows:

"In August, 1909."

Counsel for plaintiff then asked the witness the following question:

Q. "When was it completed?"

Counsel for the defendants then and there objected to said question upon the same grounds as made by them to the preceding question. Whereupon the court overruled said objection, and the witness answered the question as follows:

"In September, 1909."

To which ruling the counsel for the defendants then and there excepted.

Thereupon counsel for the plaintiff asked the witness the question:

73 "When were the ties and rails laid over the road—over the premises in dispute?"

To which question counsel for the defendants offered the same objection as urged to the preceding question, which objection was by the court overruled, and exception then and there taken to said ruling by counsel for the defendants.

Whereupon the witness answered the question:

"In the first part of October, 1909 it was completed sufficiently to get trains over it, but it was afterwards surfaced up and made thorough, and was completed so as to operate trains over it by the first part of October, 1909."

Whereupon witness stated that he was acquainted with the premises in dispute in this controversy. Thereupon the map attached to the complaint was shown the witness and he thereupon stated that he had checked it and found that it correctly delineated the right of way across the premises in dispute; that the central line as shown upon the map is the same central line shown upon plaintiff's Exhibit 4, and that the road was constructed as shown upon the map. Whereupon plaintiff offered said map in evidence. Whereupon by permission of the court counsel for defendants examined the witness on his voir dire and the witness testified as follows:

"The section marked 'L' on the map referred to the additional right of way or to the right of way claimed by the railroad
74 company on that side of the center line; that he did not insert the said section of the map, but only checked it up, as he did not make the map; that the section designated on the map as '2' referred to the additional 50 feet claimed by the railroad company on the side of their center line of the land in question, and the section marked '3' referred to the same; that is, an additional right of way which the plaintiff is now claiming in this case but not that they had claimed heretofore. The part that is colored is not what they have in their possession. What is colored is lands not in their possession, but what they claim. Am familiar with the surveys made by the company over this right of way. The survey of the center line as shown on the map is the first survey, and everything on the map refers to the center line as so surveyed. The center line was laid down, but its station numbers, the beginning of its curves, etc., and the rest of the line, everything was referred to that you see. I know of no survey having been made which marks out upon the ground except the center line of the roadbed, and the maps designating the width of the right of way at various parts through which that center line ran. I know of no map that designates the portion in blue as distinct from the other portions. The original map shows what the railroad company claimed, of which I have a copy in my pocket. The date of that was about December, 1908. I do
75 not know who drew or made the map. I do not know where he got the data by which he designated '1,' '2' and '3' on this map. As far as I know there are no maps in possession of the railroad company that only show fifty feet on each side of the center line as the right of way owned by the railroad company. I do not know to whom the initials W. H. W. apply. I left the service in June,

1910 and up to that date I know of no one to whom the initials would apply."

Whereupon counsel for the defendants objected to the introduction of the map on the ground that it was incompetent for the reason that its accuracy has not been testified to by the witness; that he knew of no surveys that had been made by the railroad company other than the one that would designate the center line of the right of way, and that the markings on the map were not made from any survey, and the witness did not know of any map or maps from which they were made or taken.

Whereupon the court overruled said objection, and the map was thereupon introduced in evidence, marked "Plaintiff's Exhibit 8;" to which said ruling the counsel for the defendants then and there objected; a copy of which said map is hereto annexed and made part of this bill of exceptions and marked "Exhibit 8."

Thereupon the direct examination of said witness was resumed and he testified as follows:

76 "The company first began construction of this part of the road shown by these maps in April, 1909; this section of the road is between nine and ten miles, and it was completed in September, 1909. I kept a profile of the work which shows where the work was performed each month during the construction, and it was along the same center line so far as the property is concerned in dispute as the center line mentioned in plaintiff's Exhibit 4. This programme profile was kept at the time the work was being constructed."

Whereupon the witness was cross examined by counsel for defendants and testified as follows:

"There was no change made in the center line of the survey through the property in question after 1908. I have seen the map known as plaintiff's Exhibit 3. That was a survey made in 1906. It does not show that the right of way crossed the lands in controversy. As far as the lands in question are concerned, it was an entirely different route. I recall the circumstance of an injunction issued by the District Court of Gila County in September, 1909, and there was no work done on the ground covered by the injunction during the time the injunction was in force. The injunction covered more than the ground in controversy, and also the ground in controversy. I know that the grading had been prac-

77 tically finished at the time of the injunction on the ground in controversy when we were ready to lay the track there. When the injunction took effect there was nothing but the grading done. At that time the center line was staked, the slope stakes were in and the finishing grade stakes to show the contractor how far to bring his cuts and fills, also such stakes as were necessary to show the beginning and ends of what culverts were there opposite the little draws; in fact, all staking necessary to construction. The work of laying track was begun on the ground in controversy in the first part of October, 1909. I don't recollect the exact date when it was finished. I think it was the day before they held a land sale out there, but what that day was now, whether October the fourth or fifth, I don't recol-

lect. It might have been October 11th. It was in the early part of October."

Plaintiff then called CLEVE W. VAN DYKE, defendant, called under the statute as a witness for the plaintiff for cross-examination who being duly sworn was examined and testified as follows:

"My name is Cleve W. Van Dyke. Am one of the defendants in this action."

Thereupon the witness was handed the defendant's amended answer and cross complaint filed January 16, 1914, and in answer to a question stated that it was his signature to the affidavit attached to the answer.

Whereupon the witness' attention was called to a portion
78 of Paragraph II of the amended answer reading:

"In answer to Paragraph IV of said first cause of action, defendants admit that while the premises in said cause of action were public lands of the United States, the said Gila Valley, Globe & Northern Railway Company entered upon the premises therein described."

And in answer to the question to state whether or not said paragraph was true, the witness stated that anything that was in the answer he had sworn to; that he swore to all of it; the paragraph in question in conjunction with the rest of it, and that the land was not patented at that time.

Thereupon P. JONES was recalled for further cross-examination by the defendants and testified as follows:

"The work was begun on the land in controversy in August, 1909. Cannot give the date other than that it was about the first part of August. My records show by the month, not by the exact date in that month. It is a fact that the work referred to as having been done in August was done at or near what is now the station grounds or what was then designated as the station grounds. The work in August was done right through the ground in question. The work on the station grounds, or at the station grounds, was done in August and July, commencing in July and finishing in August. No
79 work was done on the station grounds in September. It is not a fact that most of the work on the ground in controversy was done in September. Just the contrary. I refer to the work of grading. I do not recall a stipulation having been made with Mr. Van Dyke with reference to this work. None outside of when the injunction was served and then I obeyed it. During the injunction period, did not do any work or track laying. There might have been a little finishing up in grading. The injunction, I think, referred to track laying."

Upon redirect examination by the plaintiff, the witness testified as follows:

"The answers to the questions relative to the grading were answered from the record now held in my hand, and this record was made at the time the work was being done."

Upon recross examination the witness stated:

"That record was made by my draftsman under my charge in my office and examined by me."

Thereupon CLEVE W. VAN DYKE was recalled for further examination by the plaintiff and testified:

"I have fenced a portion of this ground delineated on the map to be a portion of the right of way as claimed on the map. It has been fenced for several years. The portion of the right of way as delineated on the map which was enclosed by the fence at the
80 commencement of this action was a portion of that tract which is shown as tract '1' and of that portion shown as tract '3.' The plat referred to is colored. Number '3' is colored yellow and number '1' is colored red. Then the whole S. E. quarter was enclosed in a fence. This had a special fence here. (The witness here indicates on the map). But the whole S. E. ¼ was enclosed in a fence in 1909. The fence referred to runs along the line indicated upon the plat and marked 'fence' in white. Then I have another fence which encloses the whole S. E. ¼. I have the tract marked '2' in red enclosed in a fence. I have no fence between my ground and the right of way, but I have a fence that encloses the entire tract, which includes that marked '2.' You see it has a high hill here, and I ran a fence down to the railroad right of way. The old grade of the railroad right of way on each side had no fence running along the right of way. The fence around my orchard was built in 1909. In fact, all of my place was enclosed in fence in 1909. This line of fence was built as I remember in 1909. The fence that is parallel with the right of way, or nearly so, shown on the map here was constructed in 1909. That was constructed about the fall of 1909 after my house was built, I should judge—I couldn't state the exact time. It was prior to the time I filed my homestead entry in the Land Office. Prior to the 22nd day of November, 1909—I think it was when I constructed this par-
81 ticular fence. I think this end fence was built after the railroad was built. This portion of it that he refers to between the orchard and the north side of the track, but on the south side of my orchard tract."

Being thereupon cross examined the witness testified:

"I was a settler on that land. At that time in possession of the land."

Upon further redirect examination by the plaintiff, the witness testified; upon being shown a photographic copy of an affidavit purporting to have been made by Cleve W. Van Dyke, the witness stated that it was a photograph of his signature.

Whereupon a statement from said affidavit was read to the witness, which statement reads as follows:

"A short time after the 22nd day of November, 1909 affiant commenced the construction of a fence enclosing said land. Thereafter and before the first of December of the present year, affiant completed the construction of a wire fence enclosing all of said lands, said fence consisting of posts and three barbed wires."

Counsel for the plaintiff then asked the witness whether he wished to correct that evidence. Whereupon the witness said:

"No, sir, that is a different fence. The fence referred to here in that isn't the fence I was talking about at all. Here we are talking about a fence enclosing the S. E. ¼. This other fence isn't a wire
fence at all, except a back end of it. Never has been. I
82 did not say that the fence now on the north side of the railroad track and on the south side of the orchard was constructed prior to November 22nd, and prior to 1909 or prior to the construction of the fence mentioned in this affidavit. I said this portion of the fence which lies between my orchard and the railroad track was not constructed prior to the construction of the railroad, but that the fence around my orchard, as I remember it, which was the eastern portion of it, was constructed prior to that time. That was what was completed first. This fence was not built all at one time. The fence I have testified about in the affidavit, a portion of it was constructed before the fence on the north side of the railroad track, and a portion of it was constructed afterwards. The portion of the fence on the north side of the railroad track was constructed before I commenced enclosing the—the first, or rather the order in which the fence was constructed, as I remember it, was the western side of the fence was constructed first, and then the posts were set for the front of the fence, and the eastern side of it was constructed next; that is, surrounding the orchard, running down the side line. Then the wire fence was constructed, completing the construction around the entire acreage, then later on the portion between the orchard and the railroad was constructed. That was
next to the last piece. The next piece of construction, as I
83 remember, was to put on some pickets I had there. It took me
some time to get the pickets. I didn't say that the fence on the north side of the railroad track was constructed after commencing the building of the fence enclosing the whole tract. I said that portion that was between the railroad track and the orchard was. I stated in the affidavit that shortly after the 22nd day of November, 1909, I commenced the construction of the fence, because I did. I answered that the fence we were referring to was the fence enclosing the entire tract. There are two tracts, the large portion is south of the railroad track and the other north of the railroad track, the portion we were discussing—the barbed wire fence built around the entire tract, it was begun after November 22, 1909. But this other fence is a small fence up near my residence, I wanted to protect my residence with. That is an entirely different matter. The fence between the orchard and the railroad track is at the same point as when first constructed. It is in approximately the same place. This is not the fence I referred to in the affidavit. The fence referred to in the affidavit was the fence constructed around the entire tract, and had nothing to do with my residence portion at all. We completed it before December. At the time the fence enclosing the entire tract, the fence between the orchard and
the railroad track was in existence. That had been there
84 sometime before I made the affidavit. But the other portion of
the fence enclosing the entire tract south of the railroad track was not commenced until after November 22nd. The same

fence on the south side is left there. The same fence on the south side of the railroad is there. It was started shortly after November 22nd and completed before December. When the fence between the orchard and the railroad right of way was built, the railroad was constructed. About two years after my fence was built, I think about two years, I took some posts up marked 'railroad property lines.' They came out of my orchard. I told them I had throwed them away and notified Mr. Mallard about it.

On further cross examination the witness testified:

"These posts were put in, as I remember, in the summer or early part of 1911. They went inside of the fence to put those posts up. That was the first time these posts were placed there. I found them inside of my property and took the posts out and notified the superintendent of the company that I had taken them up. After I had enclosed the property and had had it enclosed some two years. There were no stakes, no posts, nothing upon the ground to indicate at the time I built that fence that the railroad company claimed more than fifty feet right of way. Nothing to indicate they claimed but 100 feet. I never knew of it until two years after. They first
85 claimed more than 50 feet right of way when they put up posts about two years after I fenced the property."

On redirect examination by the counsel for the plaintiff the witness further testified:

"I never knew they had a claim. I know they never claimed any more, because the maps furnished me show only 50 feet except where the station grounds were and where the water tank was supposed to be. That is all they ever claimed, was 50 feet. All the maps I ever saw showed 50 feet."

In answer to a question whether anybody who had authority to act for the railroad company ever told him the railroad company only claimed 50 feet on each side of the center line the witness answered:

"Yes, Mr. Reppy. I have a map that was furnished me at the time by Mr. Reppy showing that. At the time that map was furnished me by Mr. Reppy I did not own the land. At the time I put that fence there between the orchard and the railroad I owned the ground as a claim homestead. I had a homestead title; I didn't have a patent to it. I would have to look that up by dates to find out whether I had any claim upon that land at the time the map was handed me by Mr. Reppy. That is June 8th. Mr. Reppy represented the railroad company as a right of way agent. He was trying to secure a right of way from me as representing the Miami Land & Improvement Company. On the date of that map I did own
86 the land. Mr. Reppy's negotiations with me extended over a period from December, 1908 until September 27, as I remember it, 1909. A long period of time, and there were various maps presented forth and back during that time."

Whereupon the plaintiff rests.

Counsel for the defendants then moved the court for judgment against the plaintiff upon the grounds, first, that plaintiff had shown

no authorization on the part of the Arizona Eastern Railroad Company, or on the part of its predecessors in interest, The Gila Valley, Globe & Northern Railway Company, to build a line of railroad, an extension, or any line of railroad or branch line over the ground in controversy; second, that there had not been shown any authorization on the part of the railroad company to enter in and upon the lands in controversy, and that it had not yet been shown that the railroad company had obtained any permit whatever or license from the Secretary of the Interior authorizing them to construct the road in question over the land in question at the time the road was constructed, it appearing that the ground in controversy at the time was part of the Crook National Forest Reserve.

Counsel for defendants further based the motion upon the ground that there had not been shown in evidence the approval by the Secretary of the Interior of any map or profile of a right of way over and across the land in controversy prior to or on the
87 22nd day of December, 1909, when plaintiff made his entry as a homesteader in this case.

Said motion was by the court overruled, to which said ruling the defendants did then and there except.

Thereupon there was introduced in evidence by counsel for defendants a proclamation of Theodore Roosevelt, President of the United States, No. 816, as certified by the Secretary of State, creating the Crook National Forest; a copy of which said proclamation with the accompanying map, is hereto annexed, marked "Exhibit A" and made a part of this bill of exceptions.

Thereupon a certified copy of an application of Cleve W. Van Dyke, dated June 5, 1909, for a segregation of said lands from the Crook National Forest, including the land in controversy, was offered in evidence by the counsel for the defendants and admitted by the court; a copy of which said application is hereto annexed, marked "Exhibit B" and made a part of this bill of exceptions. There was also introduced an amended application to same, a copy of which marked "Exhibit C" is annexed.

Thereupon there was admitted in evidence on the offer of counsel for the defendants, certain correspondence from the Chief of Operation of the Department of Agriculture in reference to the application of Cleve W. Van Dyke for the segregation of lands from the Forest Reserve, containing letters dater August 4, 1909; August 10, 1909, and September 17, 1909, and certified to by the Chief Com-
88 missioner of the General Land Office. Said correspondence is hereto annexed, marked "Exhibit E" and made a part of this bill of exceptions.

Thereupon a letter dated September 2nd from Charles E. Arnold, Receiver of the United States Land Office, was admitted in evidence; a copy of which is hereto annexed and marked "Exhibit D" and made a part of this bill of exceptions.

Thereupon there was further introduced in evidence a certified copy of the order of the Secretary of Interior eliminating certain lands from the Crook National Forest; a copy of which is hereto

annexed, marked "Exhibit F" and made a part of this bill of exceptions.

Thereupon there was admitted in evidence a United States patent issued by the United States to defendant Cleve W. Van Dyke for the S. E. ¼ of Section 30, including the lands in controversy; a copy of which said patent is hereto annexed, marked "Exhibit G" and made a part of this bill of exceptions.

Thereupon the articles of incorporation of the Gila Valley, Globe & Northern Railway Company were admitted in evidence, a copy of which is annexed hereto, marked "Exhibit H" and made a part of this bill of exceptions.

There was also admitted in evidence a certificate from the Corporation Commission for the State of Arizona certifying to the fact that the articles of incorporation had been filed, and that no other filing appeared of record prior to the filing of the articles of incorporation filed February 1, 1910; a copy of which is hereto
89 annexed, marked "Exhibit J" and made a part of this bill of exceptions.

Thereupon CLEVE W. VAN DYKE was called as a witness in his own behalf, and havingg been previously sworn was examined and testified as follows:

"Am acquainted with the ground in controversy in this action, and have known it since November, 1908. As I remember it, the Arizona Eastern Railroad Company went upon this land and graded it during the month of September, 1909. My recollection is that the grading was done during the month of September, 1909. I have a recollection of when the track laying was done. I became interested in the land in controversy in December, 1908, but did not go upon the land at that time. I did some work, but didn't go upon it myself to live there at that time. I examined the property in March, 1909 preliminary to homesteading it. I examined it to find out whether it was available for homestead purposes in an agricultural way and non-mineral way. I applied to the land office at Phoenix on May 13, 1909 to enter as a homesteader. I was informed that the land I desired was in the Forest Reserve and was referred to the Forestry Department. I filed an application. Exhibit B is a copy of the application made at that time. After making this application, on June 5, 1909 I went to the office of the Forest Sppervisor of the Crook National Forest. This was
90 on July 26, 1909. I amended my application. I saw the Forest Supervisor on that occasion. His name was T. T. Swift. He is still acting in that capacity. I had a conversation with Mr. Swift with reference to a permit to go on the land in that application. He stated that the original application that was on file in his office at that time showed a conflict with other interests, and that if I would amend the application he would grant me a permit and permit me to go on the ground and construct my improvements. The amended application was made out and I signed it right then. The further conversation had with him with reference to this permit at the time was that he granted me this permit at that

time. He told me to go ahead with my improvements and move to the ground."

Thereupon by permission of the court the witness was examined by counsel for plaintiff to test the competency of the statements of the witness with reference to the verbal permit and in answer to the questions to the witness by counsel, he testified as follows:

"The verbal permission covered the W. ½ of the S. E. ¼ and the S. E. ¼ of the S. W. ¼ of Section 30, Tp. 1 North, Range 15 East, G. S. R. B. & M. Mr. Swift said to go right on to this land, and made out an application. He told me verbally to go and named these four sections. In the conversation he said to me: 'Mr. Van Dyke, I will give you permission to go upon that land.'

91 He told me if I would amend my original application, leaving out this quarter as to where the conflict occurred, that he would issue me this permit to go on the land. I agreed to that condition. He then made out on the typewriter the amended application which I signed, then received his permission to go forward with my improvements. He told me to go upon this ground and I applied for a homestead. That was over four years ago, and the exact identical words I can't say. The substance was he told me to go on the ground applied for in this homestead entry. He gave me a special permit at that time to go forward with my improvements. He did not say he would issue a permit for it. He told me he had issued a permit. He didn't issue a written permit. I asked for a written permit, but he didn't grant the written permit at that time. He gave me permission and said written permission would follow later. It did not follow and I never did get it. I learned in Mr. Swift's office that the lands were eliminated before the written permit issued. He never issued a written permit. I never at that time had a written permit from any government official to go upon that land. I did have a verbal permission. The verbal permit was granted on July 26, 1909 in Mr. Swift's office at Stafford, Arizona."

Thereupon the direct examination of the witness was continued and the witness testified:

92 "After the permit was given by Mr. Swift, the Forest Supervisor, I went upon the ground on August 8th with my wife and selected our homesite in August, 1909. Next day I put up a tent. That is August 15, 1909, and on the same day gave the contract for the building of the house. I built my house, completed it and moved into it and have lived there ever since. I went on the ground and built a house, grubbed the ground and planted an orchard. One thing I omitted stating in the beginning was that I had the ground surveyed. I started my clearing and I started building. No one was in possession of that land when I first went into occupancy after this conversation I had with Mr. Swift, the Forest Supervisor. I was there myself on the claim. The railroad company was not at work on that land at that time."

Whereupon it was admitted by the counsel for the plaintiff that the patent to Mr. Van Dyke was issued upon his homestead entry

made on 22nd of December, 1909, including the land in controversy.

The witness continuing said:

"I was in possession of the land on November 22, 1909. I was in possession on November 22nd and have been in possession ever since, and was in possession prior thereto. I filed on the ground December 22nd in the Land Office. I never made any other
93 entry in the local Land Office and patent issued to me upon that entry. That is the only entry I made."

Thereupon the witness was cross examined by counsel for the plaintiff and further testified as follows:

"I stated that this amended application was made in Mr. Swift's office, and that he gave me verbal permission to go upon my homestead. The W. ½ of the S. E. ¼ and the S. E. ¼ of the S. W. ¼ of Sec. 30, Tp. 1 N. R. 15 G. S. R. B. & M. It was on the Forest Reserve at that time. That is what the discussion was, about the Forest Reserve all the time. Yes, he gave me a permit to go on the Forest Reserve, Crook National Forest, verbally at that time. That is my understanding. He gave me a verbal permit to go upon the Crook National Forest, upon this ground named. Prior to that time I had not filed application any where for a special use permit for the ground in controversy. I don't ever recollect filing any. That was another piece of ground I filed application for in the Forestry Department."

The witness was then shown a photographic copy of an affidavit filed with his application to enter the land December 22, 1909, as a homestead and sworn to by him before Mr. Shaffer, a notary public at Miami, and then stated that that was the affidavit he made on December 22, 1909 with regard to the land in controversy and that that was his signature attached to the affidavit.

94 "It is a fact that about mid-night on the 22nd day of December, 1909 I took up my residence in the house testified to. That is, I went off the ground and back on again at mid-night. On May 13, 1909 the Land Office referred me to the Forestry Department and told me it was still in the Forest Reserve. I don't know whether you call it a rejection or not. On June 5, 1909 I mailed an application for the W. ½ of the ¼ Section and other lands listed in the Forestry Department at Washington. That application was amended. It was not granted; it was amended, I told you. The elimination occurred. It was not granted as amended. The application was rejected. For the land in controversy on this particular amended application I asked Mr. Swift for a use permit only once. I asked him for a verbal use permit on the lands embraced in the original application. I didn't say that he verbally gave me permission twice to use this Forest Reserve on a special use permit. He gave me a verbal permission to enter the lands in controversy on the amended application once. He did not give me a verbal permission under the original application. I only recall one verbal permission affecting the lands in controversy. That is all I ever got, yes sir. In this affidavit I have just identified I said that some time

in the month of July that Theodore T. Swift, the Forest Supervisor, gave me a verbal permission to go upon and occupy the W ½
95 of said quarter section. The W. ½ of the S. E. ¼ of Section 30, yes sir. That is what he gave me. I said a while ago he gave me permission to enter on the land mentioned in that amended application, because the application for homestead entry that was included in this, but the lands that were included in this entry included only that portion of the ground that I was granted a permit for. I didn't get a use permit to occupy under the Forest Rules and Regulations the W. ½ of the S. E. ¼ of Section 30. There was 40 more acres included. That was the south ¼ of Section 30. I said several times that was the S. E. ¼ of the S. W. ¼ of—that isn't in this controversy. He gave me permission to occupy the lands in Exhibit C, and Exhibit C is the amended application of Exhibit B. I stated a while ago that he gave me one permit and that was a permit for the W. ½ of the S. E. ¼ of Section 30 and forty acres in the other ¼ section. That covers exactly the description he gave there, because it says here S. E. ¼ of the S. W. ¼ of the S. E. ¼, N. W. ¼ of the S. E. ¼ and the S. W. ¼ of the N. E. ¼ of Section 30, Tp. 1 N., R. 15 E., G. and S. R. B. & M. In the affidavit to the department, identified, made on December 22, 1909 I stated he gave me permission to occupy the W. ½ of that Section. That is what it says here, too. That was included in this. One 40 included in this I was not given permit for. The ground included in B. & C. is about the same ground as in the affi-
96 davit. The special use represented to the Forest Supervisor, I was to put this land to was agriculture and dry farming. Particularly that portion of it. I hadn't planted the portion of the land across these premises occupied by the right of way prior to December 22, 1909. I was preparing to use it. I cleared the ground and did some grubbing. Not where the right of way is. I thought you said a surrounding forty where the right of way is. I don't remember whether Mr. Swift used those particular words, 'dry farming or other agricultural purposes' or not. I did not. He told me I could go ahead with my improvements and take possession of the ground. At that time when I talked to Mr. Swift there were mining claims over a portion of these lands. They covered the right of way and where the house is. It is a fact that at that time they belonged to the Miami Land & Improvement Company, as mining claims; that they had title to it. It is a fact that on September 27, 1909 and prior thereto and on that date, that the Miami Land & Improvement Company claimed the right to this land in controversy. It is not a fact that I purchased that right after that date. I purchased that right, but not after that date, from the Miami Land & Improvement Company. I took an option on the Miami claims in September, 1908. The terms of the agreement extended over a period of a year. I have never received a deed from them.
97 Yes I have, now as I remember. It was on the 16th day of December, along about that time, December, 1909, the 16th. That was after the railroad had been constructed across these mining

claims. At the time I had this conversation with *with* Mr. Swift I had this option on these mining claims. After the option, I held possession under these mining claims. I did, yes. Along in November, 1909 there was no change. Just the same condition. I was holding possession under these mining claims when I put my tent there on the 15th day of December; and was holding possession under these mining claims when I put the lumber there to build my house. These I presume for the Miami Land & Improvement Company. I was looking after their interests. I hadn't received title yet."

Thereupon the witness was further interrogated on redirect examination by counsel for the defendants and testified:

"I made an examination to ascertain the mineral character of these lands. I decided the lands were non-mineral in character and made application for homestead entry. I went into possession under permit from the Agricultural Department and continued there as such. My intention was to be a homesteader and to occupy the land as a homestead. My purpose in purchasing the mining rights was to purchase the conflicts in the title."

98 Thereupon counsel for defendants offered in evidence a deed from the Miami Land & Improvement Company, dated 27th day of September, 1909, to the Gila Valley, Globe & Northern Railway Company, purporting to be a grant or right of way over lands in question. The deed was admitted in evidence, and a copy of which is hereto annexed, marked "Exhibit N" and made a part of this bill of exceptions.

Counsel for the defendants then offered in evidence a letter from the Chief of Operation of the Land Department to Cleve W. Van Dyke, dated Nov. 2, 1909, showing that the tract of land applied for segregation listing and examination by Van Dyke had been eliminated by the President's proclamation and the application for segregation for that reason rejected, and referring the applicant to the Land Department. The letter was received in evidence, a copy of which is hereto annexed, marked "Exhibit O" and made a part of this bill of exceptions.

EDWARD DENSER was then called as a witness on behalf of the plaintiff in rebuttal of the defendant's evidence, and being first duly sworn was examined and testified as follows:

"My name is Edward Denser. I am acquainted with the right of way of the Arizona Eastern Railroad Company over the S. ¼ of Section 30."

The further testimony of the witness having been excluded by the court, the witness was then with drawn.

99 T. T. SWIFT was then called as a witness in behalf of the plaintiff in rebuttal of the defendants' evidence, and being first duly sworn was examined and testified as follows:

"My name is T. T. Swift. I reside at Stafford, Arizona. My offi-

cial business is in the Forest Service, of the Crook National Forest having been working in that capacity since May 26, 1907. Am in the employment of the United States Government. I have under this employment charge of the Crook National Forest. Some of my duties as such Supervisor are general supervision of the entire forest, making and granting of timber sales, issuing special permits, grazing permits, and approving applications for the listing of lands. Special use permits are granted for canal water lines, wagon roads, extension of lines of railroads, as well as some residences, tent houses, sawmills, flumes, ditches, lime kilns, making hay and various other things. All permits are issued by me as supervisor of the Crook National Forest, with the exception of easements and permits for sawmills above a certain capacity. I am acquainted with the lands in controversy in this law suit, Section 30, and am acquainted with the land occupied by Mr. Van Dyke out here in Miami involved in this law suit, and also with the land occupied by the railroad company out there. I did not at any time offer to give Mr. Van Dyke a special use permit to occupy any portion of that ground. I
100 did not grant Mr. Van Dyke a special use permit to occupy this ground such as he testified to. I did not give Mr. Van Dyke a verbal special use permit to occupy the land involved in this litigation, and did not give him one in writing."

Thereupon the witness was cross examined by counsel for defendants and testified as follows:

"I have been in the Forest Service since the 1st day of February, 1907. Here in this Forest. In charge of this Forest since the 26th day of May, 1907. I know Mr. Van Dyke. Have seen him many times. He has been out to Miami with me. I have seen the land here in controversy, very frequently. My headquarters are in Safford, but am frequently in Globe and in Miami. I have seen Mr. Van Dyke frequently, but I can't remember the dates. I can't remember the dates when I saw him. I might have seen him a number of times during the summer of 1909; that I do not now recall. I remember his having been in my office during the summer, but I can't tell you what time it was. I do not recollect the occasion upon which I amended an application for him. I do not recollect that. I don't recollect making any amended application for him. These applications are quite numerous. I have had a great many of them the last few years. I do not pretend to recollect the dates in furnishing them. There may have been many, but I do not now
101 recollect. I don't issue verbal permits. I had the conversation with Mr. Van Dyke with reference to this matter today or yesterday since I came in, and I said to him simply that I didn't remember the conversation at my office with reference to this permit. My statement now is that I do not remember the conversation, no sir. I have stated that I had many applications that I do not now recollect. There are many permits that I do not now recollect only by referring to the records of the office. They are all a matter of record."

Thereupon both sides rested.

The foregoing was all the evidence introduced, heard and exhibited at the trial of said cause.

Be it further remembered that on the 4th day of January, 1915, and within the time allowed by law for the filing of this bill of exceptions, and subsequent thereto, upon motion of the defendants and the consent of the plaintiff, the defendants were by the order of the Court given until the 5th day of March, 1915 within which to file their bill of exceptions to the rulings of the Court made at the trial of this cause.

And now within the time aforesaid, to-wit, on the 1st day of March, 1915 the defendants do now present this their bill of exceptions and ask that the same may be examined, approved and allowed by the Court and filed and made and deemed to be and held a part of the record in this cause.

102 The defendants pray that this bill of exceptions may be allowed, settled and certified and signed.

SLOAN & WESTERVELT,
F. C. JACOBS,
Attorneys for Defendants.

The defendants having filed their proposed bill of exceptions within the time allowed by order of the Court, and the plaintiff having served its proposed amendments and corrections thereto upon the defendants, and the defendants having accepted and allowed said amendments and corrections and the bill of exceptions so amended and corrected, and the same having been presented by the Clerk of the Court to the undersigned, Judge of said Court, as provided by law, it is now hereby certified that said corrected and amended bill of exceptions is a full, complete and correct statement of all the evidence introduced by the parties on the hearing of the cause, and contains a full, complete and correct statement of all the testimony therein material to the issues, and that it is likewise correct in all other respects.

It is hereby ordered that said bill of exceptions be, and it is hereby approved, settled and allowed this 29 day of March, 1915.

G. W. SHUTE, *Judge.*

Refiled March 29, 1915.

103 EXHIBIT 1.

State of Arizona.

Office of the Arizona Corporation Commission.

UNITED STATES OF AMERICA,
State of Arizona, ss:

The Arizona Corporation Commission does hereby certify that the annexed is a true and complete transcript of the Articles of Incorporation and Consolidation of "Arizona Eastern Railroad Company" which were filed in the office of the Auditor of Arizona on

the 1st day of February A. D., 1910, at 10:00 o'clock A. M., as provided by law.

104 In Testimony Whereof, the Arizona Corporation Commission, by its Chairman, has hereunto set its hand and affixed its Official Seal. Done at the city of Phœnix, the Capitol, this 3rd day of February, A. D. 1914.

[Seal Arizona Corporation Commission, Phœnix.]

ARIZONA CORPORATION COMMISSION,
W. P. GEARY, *Chairman.*

Attest:
FRANK DE SOUZA, *Secretary.*

Indorsed: Pl'ff's Ex. 1—for purpose of identification 5-25-14. Pl'ff's Ex. 1. In evidence 5-25-14. J. W. W. Clk.

105 Articles of Incorporation and Consolidation of Arizona Eastern Railroad Company,

Gila Valley, Globe and Northern Railway Company,

The Maricopa and Phœnix Railroad Company,

Arizona and Colorado Railroad Company,

The Arizona and Colorado Railroad Company of New Mexico,

and

The Arizona Eastern Railroad Company of New Mexico,

under the name of

Arizona Eastern Railroad Company.

106 Articles of Incorporation and Consolidation of Arizona Eastern Railroad Company,

Gila Valley, Globe and Northern Railway Company,

The Maricopa and Phœnix Railroad Company,

Arizona and Colorado Railroad Company,

The Arizona and Colorado Railroad Company of New Mexico,

and

The Arizona Eastern Railroad Company of New Mexico,

under the name of

Arizona Eastern Railroad Company.

107 Articles of incorporation and consolidation, made and executed on the 27th day of December, 1909, by and between Arizona Eastern Railroad Company, a corporation incorporated, or-

ganized and existing under the laws of the Territory of Arizona, party of the first part; Gila Valley, Globe and Northern Railway Company, a corporation incorporated, organized and existing under the laws of the Territory of Arizona, party of the second part; The Maricopa and Phœnix Railroad Company, a corporation incorporated, organized and existing under the laws of the Territory of Arizona, party of the third part; Arizona and Colorado Railroad Company, a corporation incorporated, organized and existing under the laws of the Territory of Arizona, party of the fourth part; The Arizona and Colorado Railroad Company of New Mexico, a corporation incorporated, organized and existing under the laws of the Territory of New Mexico, party of the fifth part, and The Arizona Eastern Railroad of New Mexico, a corporation incorporated organized and existing under the laws of the Territory of New Mexico, party of the sixth part.

Witnesseth, That Whereas, the party of the first part is authorized by its Articles of Incorporation to construct lines of railroad within the Territory of Arizona, as follows: Beginning at a point on the Colorado River at or near the village of Yuma, in the County
108 of Yuma, running thence in a general easterly direction to a point at or near the village of Clifton, County of Graham, in said Territory, with spurs or connecting lines from some convenient point or points upon said main line to points at or near the cities of Jerome, Tucson, and Globe, and to convenient points upon the boundary line between the Territory of Arizona and the territory of New Mexico near the San Francisco River and the Gila River, respectively, a distance of about five hundred miles, more or less whereof there is partially constructed that portion of the line from Winkelman to San Carlos, a distance of 34 miles.

And Whereas, the party of the second part is authorized by its Articles of Incorporation to construct lines of railroad, within the Territory of Arizona, as follows:

First. Beginning at a point on the Southern Pacific Railroad at or near Bowie Station, in Cochise County, through the counties of Cochise, Graham and Gila to the town of Globe, in the County of Gila, a distance of about one hundred and twenty-five miles, more or less, all of which is now constructed and in operation.

Second. Beginning at a point at or near the Town of Globe, Gila County, and running thence in a general northerly direction along the Pinal Creek to some convenient point at or near the site of the United States Reclamation Service, Tonto Dam, a distance of about fifty miles, more or less, whereof there is constructed
109 that portion of the line from Globe to a point ten miles north thereof.

Third. Beginning at a point on the main line of the party of the second part, at or near San Carlos, and running thence in a general southwesterly direction to a point at or near the mouth of the San Pedro River, a distance of about forty miles, more or less.

Fourth. Beginning at a point on said line last described, east of Dripping Springs, Wash., and crossing the Gila River to some convenient point on the Arizona Eastern Railroad.

And Whereas, the party of the third part is authorized by its Articles of Incorporation to construct lines of railroad, within the Territory of Arizona, as follows:

First. Beginning at a point at or near the track of the Southern Pacific Railroad, at or near Maricopa Station, in Pinal County, and running thence to the City of Phœnix, in the County of Maricopa, with a spur from Hanson 2.1 miles in length, a distance of about thirty-eight miles, more or less, all of which is now constructed and in operation.

Second. Beginning at a point at or near the town of Tempe, in said County of Maricopa, and running thence in a general easterly direction to Mesa, in said County of Maricopa, a distance of about eight miles, more or less, all of which is now constructed and in operation.

And Whereas, the party of the fourth part is authorized by its Articles of Incorporation to construct lines of railroad,
110 within the Territory of Arizona, beginning at a point at or near the town of Naco, in Cochise County, and running thence in a northeasterly direction, to a point at or near the intersection of the Big Puerco River with the boundary line between the Territories of Arizona and New Mexico, with spurs or connecting lines from some convenient point or points upon said main line to points at or near the towns of Bisbee, Douglas, Turquoise, Pearce, Black Diamond and Tombstone, all of said lines and spurs being in the counties of Cochise, Graham, Gila, Navajo and Apache, a distance of about 500 miles, whereof there is now constructed and in operation that portion of the line from Gleeson to Cochise, a distance of 34.98 miles.

And Whereas, the party of the fifth part is authorized by its Articles of Incorporation to construct lines of railroad, within the Territory of New Mexico, as follows:

First. Beginning at a point on the boundary line between the Territory of New Mexico and the Territory of Arizona at or near where the San Francisco River intersects the boundary line between the Territory of New Mexico and the Territory of Arizona, about three miles north of the Grant County line, and running thence to a point on the boundary line between the State of Colorado and the Territory of New Mexico at or near the point where the Las Animas River crosses the same in the County of San Juan, Territory of New Mexico, a distance of about four hundred and fifty miles, more or less.

111 Second. Beginning at a convenient point on the main line of the party of the fifth part at or near Farmington, in San Juan County, and running thence to a point on the boundary line between the Territories of New Mexico and Arizona, on the Big Puerco River, west of Manualito, in the County of McKinley, Territory of New Mexico, a distance of about one hundred and fifty miles, more or less.

Third. Beginning at a convenient point on the main line of the party of the fifth part between Farmington and Gallego Canyon, and running thence to a point where the San Juan River intersects the

boundary line between the Territory of New Mexico and the State of Colorado, a distance of about one hundred miles, more or less.

And whereas, the party of the sixth part is authorized by its articles of incorporation to construct lines of railroad, within the Territory of New Mexico, beginning at a point on the boundary line between the Territory of New Mexico and the Territory of Arizona south of the Gila River, in the County of Grant, Territory of New Mexico, and running thence to a point at or near Lordsburg, in said County, a distance of 28.36 miles, more or less.

And whereas, pursuant to the laws of the Territories of Arizona and New Mexico, in such case made and provided, the respective Boards of Directors of said corporations, parties hereto, have agreed upon the consolidation of said corporations, their capital
112 stocks, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description, upon the terms and in the manner hereinafter set forth.

And whereas, stockholders of said respective corporations, parties hereto, representing more than three-fourths of the subscribed capital stock of their respective corporations, have, in writing consented to ratified and confirmed said consolidation upon the terms and in the manner hereinafter set forth, which said consent, ratification and confirmation by said stockholders of the parties hereto is evidenced by the written memoranda annexed hereto, which said memoranda are respectively signed by stockholders representing more than three-fourths of the subscribed capital stock of the respective corporations, parties hereto, as aforesaid:

Now Therefore, Know All Men by These Presents, that the parties hereto, pursuant to the laws of the Territories of Arizona and New Mexico in such case made and provided, do hereby consolidate their capital stocks, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts liabilities and assets of every kind and description, and in pursuance of said consolidation, and in order to more fully carry the same into force and effect, do hereby adopt the following

113 Articles of Incorporation and Consolidation.

I.

The name of the new and consolidated corporation shall be "Arizona Eastern Railroad Company."

II.

The purpose for which said consolidated corporation is formed is as follows, to-wit:

To possess, enjoy and exercise all the franchises, powers, privileges, abilities, rights, immunities and properties of each and every of its constituent corporations, and all franchises, powers, privileges, abilities, rights and immunities which are or may hereafter be con-

ferred upon railroad corporations by the laws of the Territories of Arizona and New Mexico, or either of them.

To purchase, acquire, construct, lease, hire, rent, own, control, maintain, and operate lines of railroad, telegraph and telephone, and to carry passengers and freight on and over said lines of railroad for hire, and to maintain and operate lines of telegraph and telephone in connection therewith, and to sell, lease and mortgage any or all of said lines of railroad, telephone and telegraph to other persons or corporations as may be permitted by law. The kinds of railroads to be purchased, acquired, constructed, leased, hired, rented, owned, controlled, maintained, operated sold, leased and mortgaged as aforesaid by the said consolidated corporation are railroads having either a standard *guage* or a narrow *guage* and one or more
114 tracks, with all necessary switches, side tracks, turnouts, turntables, terminal accommodations, station houses, machine shops, and all other adjuncts and appliances necessary or convenient to the operation of the same; said railroads to be operated by steam, electricity or any other motive power which may be authorized by law.

III.

The place where the principal business of said corporation is to be transacted is the City of Tucson, County of Pima, in the Territory of Arizona.

IV.

The term for which said corporation is to exist is fifty (50) years from and after the date hereof.

V.

The number of Directors of said corporation shall be nine, and the names, residences of the persons appointed to act as such until their successors are elected and qualified, are as follows:

Names.	Residences.
Robert S. Lovett,	New York city, N. Y.
Epes Randolph,	Tucson, Arizona.
Eugene S. Ives,	Tucson, Arizona.
Charles E. Walker,	Tucson, Arizona.
M. A. Smith,	Tucson, Arizona.
Gibson Taylor,	Tucson, Arizona.
Benjamin Titus,	Lordsburg, New Mexico.
D. H. Kedzie,	Lordsburg, New Mexico.
M. M. Crocker,	Lordsburg, New Mexico.

115 VI.

The amount of the capital stock of said corporation shall be Forty Million Dollars, divided into 400,000 shares, of the par value

of One Hundred Dollars ($100) each, which said amount of capital stock does not exceed the amount actually required for the purposes of said new corporation, as estimated by competent engineers, as will appear by the written estimate of such engineers, duly signed by them, and filed in the office of said corporation, a duplicate original whereof is hereunto annexed.

VII.

The amount of said capital stock which has been actually subscribed is $5,321,400, consisting of 53,214 shares, which have been subscribed for by and allotted to the stockholders of the constituent corporation hereof, pursuant to and in accordance with the terms of said consolidation hereinafter set forth in full, in the following proportions and amounts, to-wit:

To the Arizona Eastern Railroad Company and its stockholders, 10,004 shares.

To the Gila Valley, Globe and Northern Railway Company, and its stockholders, 20,000 shares.

To the Maricopa and Phoenix Railroad Company and its stockholders, 10,005 shares.

To the Arizona and Colorado Railroad Company and its stockholders, 5,005 shares.

To the Arizona and Colorado Railroad Company of New Mexico and its stockholders, 7,000 shares.

116 To the Arizona Eastern Railroad Company of New Mexico and its stockholders, 1,200 shares.

VIII.

The termini of the roads and branches of said consolidated company are as follows:

First. Commencing at a connection with the Southern Pacific Railroad, at or near the Town of Yuma, in the County of Yuma, Territory of Arizona, thence in a general easterly direction to Phoenix, in the County of Maricopa, Territory of Arizona, a distance of about 160 miles.

Second. Commencing at a connection with the line last described at Phœnix, in the County of Maricopa, Territory of Arizona, thence in a general easterly and southeasterly direction through the Territories of Arizona and New Mexico to a connection with the Southern Pacific Railroad at or near the Town of Lordsburg, in the County of Grant, in the Territory of New Mexico, a distance of about 280 miles, about 250 miles thereof being in the Territory of Arizona and 30 miles thereof in the Territory of New Mexico.

Third. A branch from said second described line commencing at or near the station of Solomon, in the County of Graham, Territory of Arizona, thence in a general southerly direction to a connection with the Southern Pacific Railroad at or near the station of Bowie, in the County of Cochise, Territory of Arizona, a distance of 34.64 miles.

Fourth. A branch, hereinafter referred to as line number
117 four, from said second described line commencing at a point near the San Carlos Indian Agency, in the County of Gila, Territory of Arizona, thence in a general northerly and northeasterly direction, via Talkai, passing through the Town of Globe in the said County of Gila, and through the Territory of New Mexico, to a point on the boundary line between the Territory of New Mexico and the State of Colorado near where the same is intersected by Las Animas River, a distance of approximately 428 miles, approximately 270 miles thereof being in the Territory of Arizona and 158 miles thereof in the Territory of New Mexico, with branches from this branch line as follows:

4*a*. Commencing at a point on the above mentioned line number four, in the County of San Juan, Territory of New Mexico, where said line number four crosses the divide between the San Juan and Chusca Rivers, thence in a northeastly direction to a point on the boundary line between the State of Colorado and the Territory of New Mexico, at or near where the same is intersected by La Plata River, a distance of approximately 35 miles.

4*b*. Commencing at a point on the above mentioned line number four at or near the station of Talkai, in the County of Gila, Territory of Arizona, thence in a general northeasterly direction to a point on said line number four in the vicinity of the point where it intersects the boundary line between the Territory of Arizona and the Territory of New Mexico, a distance of approximately 200 miles; and

4*c*. Commencing at a point on the above mentioned line
118 number four at a point at or near the junction of Bloody Tanks Wash with Pinal Creek, thence in a general westerly direction up Bloody Tanks Wash, and its tributaries, to the mining camp of Live Oaks; also other extensions and branches to other suitable points, all in the County of Gila, Territory of Arizona, a distance of approximately 20 miles.

4*d*. Commencing at a point on the above mentioned line number four at or near Globe, thence in a general northerly direction to the Black Hawk Mines, thence in a general southwesterly direction to a connection with said line number four at or near the Old Dominion Smelter at Globe, all in the County of Gila, Territory of Arizona, a distance of approximately 16 miles.

Fifth. A branch from said second described line, commencing at a point in the County of Graham, Territory of Arizona, at or near the mouth of the San Francisco River, thence in a northeasterly and northerly direction, passing through or near the town of Clifton, in the County of Graham, Territory of Arizona, and into and through the territory of New Mexico, to a point on the above mentioned branch line number four, between the towns of Farmington and Aztec, in the County of San Juan of said Territory of New Mexico, a distance of approximately 410 miles; approximately 65 miles thereof being in the Territory of Arizona and 345 miles thereof being in the Territory of New Mexico.

Sixth. A line beginning at a connection with the South-
119 ern Pacific Railroad at or near Cochise Station, in the County of Cochise, Territory of Arizona, thence in a southerly and easterly direction to a point on the International Boundary Line between the United States and Mexico, in the vicinity of Douglas, in the County of Cochise, Territory of Arizona, distance of approximately 69 miles, with branches from the most suitable points to the town of Bisbee, the mining camps of Black Diamond, Gleeson and Turquoise, and a branch from said Bisbee Branch to a point on the aforesaid International Boundary Line in the vicinity of Naco, all in said County of Cochise and Territory of Arizona, the total length of said branches being approximately 30 miles.

Seventh. A branch from said second described line commencing at a point in the aforesaid City of Phoenix, in the County of Maricopa, Territory of Arizona, thence in an easterly and southerly direction to a point at or near the station of Maricopa, in the County of Pinal, Territory of Arizona, a distance of approximately 34.93 miles.

Eighth. A branch line beginning at or near the station of Tempe, in the County of Maricopa, Territory of Arizona, running thence in an easterly direction to a second connection with said second described line, at or near the town of Mesa, in the said County of Maricopa, a distance of approximately 8.33 miles.

Ninth. A branch from said second described line con-
120 necting at a suitable point south of the town of Mesa, in said County of Maricopa, thence in a southerly and westerly direction to a connection with the aforementioned branch numbered seventh, at or near the station known as Hanson Junction, a distance of approximately 14 miles.

Tenth. A branch from the said second described line commencing at a point at or near the station of Florence, in the County of Pinal, Territory of Arizona, thence in a southwesterly direction to a connection with the Southern Pacific Railroad at or near the station of Casa Grande, in said County of Pinal, Territory of Arizona, a distance of approximately 26 miles.

Eleventh. A branch from said second described line commencing at a point between the station of Florence and a point known as The Buttes, thence in a northeasterly direction to the mining camp known as Superior, all in said County of Pinal, Territory of Arizona, a distance of approximately 25 miles.

Twelfth. A branch from said second described line commencing at a point at or near the junction of the San Pedro and Gila Rivers, in the County of Gila, Territory of Arizona, thence following in a general southeasterly direction the course of the San Pedro River to a connection with the Southern Pacific Railroad at or near the town of Benson, in the County of Cochise, Territory of Arizona, a distance of approximately 80 miles.

Thirteenth. A line beginning at a point on the Interna-
121 tional Boundary Line between the United States and Mexico at or near the town of Lochiel, in the County of Santa Cruz, Territory of Arizona, thence in a general northwesterly direction

to a point at or near the mining camp of Duquesne, in said County of Santa Cruz, a distance of approximately 6 miles.

Together with such other and further branches, extensions, spurs, appendages and adjuncts to the hereinbefore described lines of railroad, as the Board of Directors of said consolidated corporation may from time to time direct.

IX.

The estimated length of said railroads and branches of said consolidated corporation is 1,877 miles.

X.

More than ten per cent of the subscribed capital stock of said consolidated corporation, as set forth in Article VII hereof, has been paid in.

XI.

The names of the constituent corporations are Arizona Eastern Railroad Company, Gila Valley, Globe and Northern Railway Company, The Maricopa and Phoenix Railroad Company, and Arizona and Colorado Railroad Company, railroad corporations incorporated, organized and existing under the laws of the Territory of Arizona, and The Arizona and Colorado Railroad Company of New Mexico, and the Arizona Eastern Railroad Company of New Mexico, railroad corporations incorporated, organized and existing under the laws of the Territory of New Mexico.

122 The terms and conditions of said consolidation in full, and as the same are set forth in the agreement of consolidation between the Boards of Directors of the several constituent corporations, are as follows, to-wit:

First. That the said consolidation shall be made at once, that the name of said consolidated corporation shall be "Arizona Eastern Railroad Company," and that the said consolidated corporation shall continue in existence for a period of fifty years from the date of these Articles of Incorporation and Consolidation.

Second. That upon the filing of these Articles of Incorporation and Consolidation in the offices prescribed by the laws under which this consolidation is effected, the constituent companies named herein shall become and be extinct, and said new corporation Arizona Eastern Railroad Company, shall be vested with and succeed to all their several capital stocks, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, assets, choses and right in action of every kind and description, both at law and in equity, and be entitled to possess, enjoy and enforce the same and every thereof as fully and completely as either and every of its constituents might have done had no consolidation taken place.

Said consolidated or new corporation, Arizona Eastern Railroad Company, shall also, upon the filing of these Articles of Incorpora-

tion and Consolidation, as aforesaid, become and be subro-
123 gated to its said several constituents and each thereof in respect to all their contracts and agreements with other parties, and all their debts, obligations and liabilities, of every kind and nature to any persons, corporations or bodies politic whomsoever or whatsoever, and said new and consolidated corporation shall sue and be sued in its own name in any and every case in which any or either of its said constituents might have sued, or might have been sued at law or in equity, had no such consolidation been made.

And the said consolidation shall not be construed to impair the obligation of any contract to which any of the constituent corporations shall be parties at the date of said consolidation but all such contracts may be enforced by action or suit, as the case may be, against the consolidated corporation, and satisfaction obtained out of the property which, at the date of the consolidation, shall have belonged to the constituent corporation which was a party to the contract in action or suit, as well as out of any other property belonging to said consolidated corporation, Arizona Eastern Railroad Company.

Third. The amount of the capital stock of said consolidated corporation, Arizona Eastern Railroad Company, shall be Forty Million Dollars, which said amount of capital stock is the amount actually required for the purposes of the said new corporation, as estimated by competent engineers appointed to make such estimate by the several Board of Directors of the constituent corporations.

Said capital stock of said consolidated corporation shall be
124 divided into four hundred thousand (400,000) shares of the par value of one hundred ($100) each, of which capital stock $5,321,400, consisting of 53,214 shares, shall be subscribed for by and allotted to the stockholders of said constituent corporation, as follows:

"

To the Arizona Eastern Railroad Company and its stockholders, 10,004 shares.

To the Gila Valley, Globe and Northern Railway Company, and its stockholders, 20,000 shares.

To the Maricopa and Phoenix Railroad Company and its stockholders, 10,005 shares.

To the Arizona and Colorado Railroad Company and its stockholders 5,005 shares.

To the Arizona and Colorado Railroad Company of New Mexico and its stockholders, 7,000 shares.

To the Arizona Eastern Railroad Company of New Mexico and its stockholders, 1,200 shares.

The several stockholders of each of said constituent corporations shall have issued to them by the said consolidated corporation shares of the capital stock of the consolidated corporation, out of the shares thereof allotted as aforesaid to the respective constituent corporations and their stockholders, to the like amount, share for share, with the number of shares now held by such stockholders in the respective constituent corporation, and the shares of the consolidated corporation so issued shall be full paid shares, except that if

any stockholder of any of said constituent corporations shall be the holders of shares therein only partially paid up, then the shares of the capital stock of the consolidated corporation issued to him therefor shall be paid up only to the same extent as those held by him in the constituent corporations.

Fourth. That the purpose for which the consolidated corporation is formed, the place where its principal business is to be transacted, the number of its directors and the names and residences of the persons appointed to act as such directors until their successors are elected and qualified, the termini of its roads and branches, the estimated length of its roads and branches, and the names of the constituent corporations set forth in the aforesaid agreement of consolidation are as expressed in these Articles of Incorporation, and consolidation which said Articles of Incorporation and Consolidation were, by the terms of said agreement of consolidation, authorized to to be signed and countersigned by their respective Presidents and the several constituent corporations, and sealed with the respective corporate seals of said constituent corporations.

In witness whereof, the said parties have caused these presents to be signed and countersigned by their respective Presidnts and Secretaries, and their respective corporate seals to be hereunto affixed pursuant to resolutions of their respective Board of Directors, heretofore duly made and adopted on the day and year first above written.

[CORPORATE SEAL.]

ARIZONA EASTERN RAILROAD COMPANY,
By EPES RANDOLPH, *President.*

Countersigned by,
CHAS. E. WALKER,
Secretary.

[CORPORATE SEAL.]

GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY,
By EPES RANDOLPH, *President.*

Countersigned by,
CHAS. E. WALKER,
Secretary.

[CORPORATE SEAL.]

THE MARICOPA AND PHOENIX RAILROAD COMPANY,
By EPES RANDOLPH, *President.*

Countersigned by,
G. L. KING,
Secretary.

[CORPORATE SEAL.]

ARIZONA AND COLORADO RAILROAD COMPANY,
By EPES RANDOLPH, *President.*

Countersigned by,
CHAS. E. WALKER,
Secretary.

127 [CORPORATE SEAL.]

THE ARIZONA COLORADO RAILROAD COMPANY OF NEW MEXICO,
By EPES RANDOLPH, *President.*

Countersigned by,
CHAS. E. WALKER,
Secretary.

[CORPORATE SEAL.]

THE ARIZONA EASTERN RAILROAD COMPANY OF NEW MEXICO,
By EPES RANDOLPH, *President.*

Countersigned by,
CHAS. E. WALKER,
Secretary.

TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, on this day personally appeared Epes Randolph and Charles E. Walker, known to me to be President and Secretary, respectively, of Arizona Eastern Railroad Company, a corporation incorporated and existing under the laws of the Territory of Arizona, and to be the persons whose names are subscribed to the foregoing instrument, and as such officers, respectively, of said corporation, severally acknowledged the execution of said instrument as the free act and deed of said corporation, by each of them voluntarily
128 executed, for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My commission expires May 9th, 1911.

TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me appeared Epes Randolph and Charles E. Walker, to me personally known, who be-

ing by me severally duly sworn, did say that the said Epes Randolph is the President and the said Charles E. Walker is the Secretary of Arizona Eastern Railroad Company, a corporation organized and existing under the laws of the Territory of Arizona, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Epes Randolph and Charles E. Walker severally acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My commission expires May 9th, 1911.

129 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn on this day personally appeared Epes Randolph and Charles E. Walker, known to me to be President and Secretary respectively of Gila Valley, Globe and Northern Railway Company, a corporation incorporated and existing under the laws of the Territory of Arizona, and to be the persons whose names are subscribed to the foregoing instrument and, as such officers, respectively, of said corporation, severally acknowledged the execution of said instrument as the free act and deed of said corporation, by each of them voluntarily executed, for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My commission expires May 9th, 1911.

130 TERITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me appeared Epes Randolph and Charles E. Walker, to me personally known, who being by me severally duly sworn, did say that the said Epes Randolph is the President and the said Charles E. Walker is the Secretary of Gila Valley, Globe and Northern Railway Company, a corporation organized and existing under the laws of the Territory of Arizona, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Tpes Randolph and Charles E. Walker

severally acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My commission expires May 9th, 1911.

131 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, on this day personally appeared Epes Randolph, known to me to be President of the Maricopa and Phoenix Railroad Company, a corporation incorporated and existing under the laws of the Territory of Arizona, and to be the person whose name is subscribed to the foregoing instrument, and, as such president of said corporation, acknowledged the execution of said instrument as the free act and deed of said corporation, by him voluntarily executed for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My commission expires May 9th, 1911.

132 TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me appeared Epes Randolph, to me personally known, who, being by me duly sworn, did say that he is the President of The Maricopa and Phoenix Railroad Company, a corporation organized and existing under the laws of the Territory of Arizona, and that the seal affixed is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Epes Randolph acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9, 1911.

133 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Before me, E. B. Ryan, a Notary Public in and for the City and County of San Francisco, State of California, duly commissioned

and sworn, on this day personally appeared G. L. King, known to me to be Secretary of The Maricopa and Phoenix Railroad Company, a corporation incorporated and existing under the laws of the Territory of Arizona, and to be the person whose name is subscribed to the foregoing instrument, and, as such Secretary of said corporation, acknowledged the execution of said instrument as the free act and deed of said corporation, by him voluntarily executed for the purpose and consideration therein expressed.

Given under my hand and seal of office this 31st day of December, 1909.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public, in and for the City and County of San Francisco, State of California.

My Commission expires Feb. 17, 1910.

134 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 31st day of December, 1909, before me appeared G. L. King, to me personally known, who being by me duly sworn, did say that he is Secretary of The Maricopa and Phœnix Railroad Company, a corporation organized and existing under the laws of the Territory of Arizona; and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said G. L. King acknowledged said instrument to be free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public, in and for the City and County of San Francisco, State of California.

My Commission expires Feb. 17, 1910.

135 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, on this day personally appeared Epes Randolph and Charles E. Walker, known to me to be President and Secretary, respectively, of Arizona and Colorado Railroad Company, a corporation incorporated and existing under the laws of the Territory of Arizona, and to be the persons whose names are subscribed to the foregoing instrument, and, as such officers, respectively, of said corporation, severally acknowledged the execution of said instrument as the free act and deed of said corporation, by each of them voluntarily executed for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

136 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, on this day personally appeared Epes Randolph and Charles E. Walker, known to me to be the President and Secretary, respectively, of Arizona and Colorado Railroad Company, a corporation incorporated and existing under the laws of the Territory of Arizona, and to be the persons whose names are subscribed to the foregoing instrument, and, as such officers, respectively, of said corporation, severally acknowledged the execution of said instrument as the free act and deed of said corporation, by each of them voluntarily executed for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

137 TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me appeared Epes Randolph and Charles E. Walker, to me personally known, who being by me severally duly sworn did say that the said Epes Randolph is the President and the said Charles E. Walker is the Secretary of Arizona and Colorado Railroad Company, a corporation organized and existing under the laws of the Territory of Arizona, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Epes Randolph and Charles E. Walker severally acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

138 TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me appeared Epes Randolph and Charles E. Walker, to me personally known, who being by me severally sworn did say that the said Epes Randolph is the President and the said Charles E. Walker is the Secretary of The Arizona and Colorado Railroad Company of New Mexico, a corporation incorporated and existing under the laws of the Territory of New Mexico; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was

signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Epes Randolph and Charles E. Walker severally acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

139 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, personally appeared Epes Randolph and Charles E. Walker, known to me to be the President and Secretary respectively, of The Arizona and Colorado Railroad Company of New Mexico, a corporation incorporated and existing under the laws of the Territory of New Mexico, and to be the persons whose names are subscribed to the foregoing instrument, and, as such officers, respectively, of said corporation, severally acknowledged the execution of said instrument as the free act and deed of said corporation, by each of them voluntarily executed for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

140 TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me appeared Epes Randolph and Charles E. Walker, to me personally known, who, being by me severally duly sworn, did say that the said Epes Randolph is the President and the said Charles E. Walker is the Secretary of The Arizona Eastern Railroad Company of New Mexico, a corporation incorporated and existing under the laws of the Territory of New Mexico; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Epes Randolph and Charles E. Walker severally acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County.

My Commission expires May 9th, 1911.

141 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, personally appeared Epes Randolph and Charles E. Walker, known to me to be the President and Secretary, respectively, of The Arizona Eastern Railroad Company of New Mexico, a corporation incorporated and existing under the laws of the Territory of New Mexico, and to be the persons whose names are subscribed to the foregoing instrument, and, as such officers, respectively, of said corporation, severally acknowledged the execution of said instrument as the free act and deed of said corporation, by each of them voluntarily executed for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

142 We, the undersigned competent engineers appointed by resolutions duly adopted by the respective Board- of Directors of Arizona Eastern Railroad Company, Gila Valley, Globe and Northern Railway Company; The Maricopa and Phœnix Railroad Company, and the Arizona and Colorado Railroad Company, railroad corporations incorporated, organized and existing under the laws of the Territory of Arizona, and The Arizona and Colorado Railroad Company of New Mexico, and The Arizona Eastern Railroad Company of New Mexico, railroad corporations incorporated, organized and existing under the laws of the Territory of New Mexico, to estimate the amount of capital stock actually required for the purposes of a new corporation intended to be formed by the consolidation of said companies, do hereby certify that after a careful examination made pursuant to said resolutions we have estimated and do hereby estimate that the amount of capital stock which will be actually required for the purpose of said new and consolidated corporation will be the sum of forty million dollars ($40,000,000).

In Witness Whereof, we have hereunto set our hands on this 27th day of December, 1909.

J. C. McCLURE.
E. J. GASS.

143 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, on this day personally appeared J. C. McClure and E. J. Gass, known to me to be the persons whose names are signed to the foregoing instrument and severally acknowledged to me that they

executed the same for the purpose and consideration therein expressed.

Given under my hand and seal this 27th day of December, 1909, A. D.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My commission expires May 9th, 1911.

TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me personally appeared J. C. McClure and E. J. Gass, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same as their free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My commission expires May 9th, 1911.

144 This is to certify that we, the undersigned stockholders of Arizona Eastern Railroad Company, a railroad corporation incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona, representing more than three-fourths of the subscribed capital stock of said corporation, do hereby ratify and confirm the consolidation of the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of the said Arizona Eastern Railroad Company, with the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of Gila Valley, Globe and Northern Railway Company, The Maricopa and Phœnix Railroad Company, and Arizona and Colorado Railroad Company, railroad corporations incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona and The Arizona and Colorado Railroad Company of New Mexico and The Arizona Eastern Railroad Company of New Mexico, railroad corporations incorporated, organized and existing under the laws of the Territory of New Mexico, upon the terms and in the manner agreed upon and fully set forth in the Articles of Incorporation and Consolidation of said several corporations hereto annexed; and

145 We, the undersigned, do hereby ratify and confirm said Articles of Incorporation and Consolidation hereto attached in all respects and particulars.

We further certify that we each severally own and hold the number of shares of the capital stock of the said Arizona Eastern Rail-

road Company, first hereinbefore named, set opposite our respective signatures hereto.

In witness whereof, we have hereunto signed our names this 27th day of December, 1909, to this written memorandum of ratification and confirmation, by the undersigned, of said consolidation and the aforesaid Articles of Incorporation and Consolidation, hereto annexed, hereby intending to give our consent thereto in all respects and particulars.

No. of Shares: 5,001. 5000.

EPES RANDOLPH.
EUGENE S. IVES.

TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, on this day personally appeared Epes Randolph and Eugene S. Ives, known to me to be the persons whose names are subscribed to the foregoing instrument, and severally acknowledged to
146 me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December 1909, before me personally appeared Epes Randolph and Eugene S. Ives, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same as their free act and deed.

In Testimony whereof, I have hereunto set my hand and affixed my official seal the day and year first above mentioned.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

This is to certify that we, the undersigned stockholders of Gila Valley, Globe and Northern Railway Company, a railroad corporation incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona, representing more than
147 three-fourths of the subscribed capital stock of said corporation, do hereby ratify and confirm the consolidation of the capital stock properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of the said Gila Valley, Globe and Northern Railway Company, with the capital stock,

properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description, of Arizona Eastern Railroad Company, The Maricopa and Phœnix Railroad Company and Arizona and Colorado Company, railroad corporations incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona, and the Arizona and Colorado Railroad Company of New Mexico and the Arizona Eastern Railroad Company of New Mexico, railroad corporations incorporated, organized and existing under the laws of the Territory of New Mexico, upon the terms and in the manner agreed upon and fully set forth in the Articles of Incorporation and Consolidation of said several corporations hereto annexed; and

We the undersigned, do hereby ratify and confirm said Articles of Incorporation and Consolidation hereto attached, in all respects and particulars.

We further certify that we each severally own and hold
148 the number of shares of the capital stock of said Gila Valley, Globe and Northern Railway Company, first herein before named, set opposite our respective signatures hereto.

In witness whereof, we have hereunto signed our names this 27th day of December, 1909, to this written memorandum of ratification and confirmation, by the undersigned, of said consolidation and the aforesaid Articles of Incorporation and Consolidation hereto annexed, hereby intending to give our consent thereto in all respects and particulars.

No. of shares: 19,975.

EPES RANDOLPH.

TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, on this day personally appeared Epes Randolph, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

149 TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me personally appeared Epes Randolph, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

This is to certify that we, the undersigned stockholders of the Maricopa and Phœnix Railroad Company, a railroad corporation incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona, representing more than three-fourths of the subscribed capital stock of said corporation, do hereby ratify and confirm the consolidation of the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of said The Maricopa and Phœnix Railroad Company, with the capital stock, properties, roads equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of Ari-
150 zona Eastern Railroad Company, Gila Valley, Globe and Northern Railway Company and Arizona and Colorado Railroad Company, railroad corporations incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona and The Arizona and Colorado Railroad Company of New Mexico and The Arizona Eastern Railroad Company of New Mexico, railroad corporations incorporated, organized and existing under the laws of the Territory of New Mexico, upon the terms and in the manner agreed upon and fully set forth in the Articles of Incorporation and Consolidation of said several corporations hereto annexed; and

We, the undersigned, do hereby ratify and confirm said Articles of Incorporation and Consolidation hereto attached, in all respects and particulars.

We further certify that we each severally own and hold the number of shares of the capital stock of said The Maricopa and Phœnix Railroad Company first hereinbefore named, set opposite our respective signatures hereto.

In Witness Whereof, we have hereunto signed our names this 17th day of January, 1910, to this written memorandum of the ratification and confirmation, by the undersigned, of said consolidation and the aforesaid Articles of Incorporation and Consoli-
151 dation hereto annexed, hereby intending to give our consent thereto in all respects and particulars.

No. of shares: 10,001.

PETER F. DUNNE.

STATE OF NEW YORK,
County of New York, ss:

Before me, Henry W. Clark, a Notary Public in and for the County and State of New York, duly commissioned and sworn, on this day personally appeared Peter F. Dunne, known to me to be the person whose name is subscribed to the foregoing instrument and

acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 17th day of January, 1910.

[NOTARIAL SEAL.] HENRY W. CLARK,
Notary Public, County and State of New York.

My Commission expires March 30, 1910.

STATE OF NEW YORK,
County of New York, ss:

On this 17th day of January, 1910, before me personally appeared Peter F. Dunne, to me known to be the person described in
152 and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[NOTARIAL SEAL.] HENRY W. CLARK,
Notary Public, County and State of New York.

My Commission expires March 30, 1910.

This is to certify that we, the undersigned stockholders of Arizona and Colorado Railroad Company, a railroad corporation incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona, representing more than three-fourths of the subscribed capital stock of said corporation, do hereby ratify and confirm the consolidation of the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of the said Arizona and Colorado Railroad Company, with the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of Arizona Eastern Railroad Company, Gila Valley, Globe and Northern Railway Company and The Maricopa and Phoenix Railroad Company,
153 railroad corporations incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona, and The Arizona and Colorado Railroad Company of New Mexico, and The Arizona Eastern Railroad Company of New Mexico, railread corporations incorporated, organized and existing under the laws of the Territory of New Mexico, upon the terms and in the manner agreed upon and fully set forth in the Articles of Incorporation and Consolidation of said several corporations hereto annexed; and

We, the undersigned, do hereby ratify and confirm said Articles of Incorporation and Consolidation hereto attached, in all respects and particulars.

We further certify that we each severally own and hold the number of shares of the capital stock of the said Arizona and Colo-

rado Railroad Company, first hereinbefore named, set opposite our respects and particulars.

In Witness Whereof, we have hereunto signed our names this 27th day of December, 1909, to this written memorandum of the ratification and confirmation, by the undersigned, of said Consolidation and the aforesaid Articles of Incorporation and consolidation hereto annexed, hereby intending to give our consent thereto in all respects and particulars.

No. of shares: 4,985.

EPES RANDOLPH.

154 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn, on this day personally appeared Epes Randolph, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me personally appeared Epes Randolph, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9, 1911.

155 This is to certify that we, the undersigned stockholders of The Arizona and Colorado Railroad Company of New Mexico, a railroad corporation incorporated, organized and existing under and by virtue of the laws of the Territory of New Mexico, representing more than three-fourths of the subscribed capital stock of said corporation, do hereby ratify and confirm the consolidation of the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of said The Arizona and Colorado Railroad Company of New Mexico, with the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts,

agreements, obligations, debts, liabilities and assets of every kind and description, of Arizona Eastern Railroad Company, Gila Valley Globe and Northern Railway Company, the Maricopa and Phœnix Railroad Company, and Arizona and Colorado Railroad Company, railroad corporations incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona, and the Arizona Eastern Railroad Company of New Mexico, a railroad corporation, incorporated, organized and existing under the laws of the Territory of New Mexico, upon the terms and in the manner agreed upon and fully set forth in the Articles of Incorporation and Consolidation of said several corporations hereto annexed; and

156 We, the undersigned, do hereby ratify and confirm said Articles of Incorporation and Consolidation hereto attached, in all respects and particulars.

We further certify that we each severally own and hold the number of shares of the capital stock of said the Arizona and Colorado Railroad Company of New Mexico, first herein before named, set opposite our respective signatures hereto.

In witness whereof, we have hereunto signed our names this 27th day of December, 1909, to this written memorandum of the ratification and confirmation, by the undersigned, of said Consolidation and the aforesaid Articles of Incorporation and consolidation hereto annexed, hereby intending to give our consent thereto in all respects and particulars.

No. of shares: 6,996. EPES RANDOLPH.

TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me personally appeared Epes Randolph, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

157 In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the County of Pima, Territory of Arizona, duly commissioned and sworn on this day, personally appeared Epes Randolph, to me known to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 27th day of December, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

This is to certify that we, the undersigned stockholders of the Arizona Eastern Railroad Company of New Mexico, a railroad corporation incorporated, organized and existing under and by virtue of the laws of the Territory of New Mexico, representing more
158 than three-fourths of the subscribed capital stock of said corporation, do hereby ratify and confirm the consolidation of the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description of said the Arizona Eastern Railroad Company of New Mexico, with the capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and descriptions of Arizona Eastern Railroad Company, Gila Valley, Globe and Northern Railway Company, the Maricopa and Phœnix Railroad Company, and Arizona and Colorado Railroad Company, railroad corporations incorporated, organized and existing under and by virtue of the laws of the Territory of Arizona, and the Arizona and Colorado Railroad Company of New Mexico, a railroad corporation incorporated, organized and existing under and by virtue of the laws of the Territory of New Mexico, upon the terms and in the manner agreed upon and fully set forth in the Articles of Incorporation and Consolidation of said several corporation- hereto annexed; and

We, the undersigned, do hereby ratify and confirm said Articles of Incorporation and Consolidation hereto attached, in all respects and particulars.

159 We further certify that we and each severally own and hold the number of shares of the capital stock of said the Arizona Eastern Railroad Company of New Mexico, first hereinbefore named, set opposite our respective signatures hereto.

In witness whereof, we have hereunto signed our names this 27th day of December, 1909, to this written memorandum of the ratification and confirmation, by the undersigned, of said consolidation and the aforesaid Articles of Incorporation and Consolidation hereto annexed, hereby intending to give our consent thereto in all respects and particulars.

No. of shares: 1,196.

EPES RANDOLPH.

TERRITORY OF ARIZONA,
County of Pima, ss:

On this 27th day of December, 1909, before me personally appeared Epes Randolph, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

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) TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, a Notary Public in and for the unty of Pima, Territory of Arizona, duly commissioned and orn on this day, personally appeared Epes Randolph, known to to be the person whose name is subscribed to the foregoing in-ument, and acknowledged to me that he executed the same for the rpose and con-ideration therein expressed.

iven under my hand and seal of office this 27th day of Decem-, 1909.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public, Pima County, Arizona.

My Commission expires May 9th, 1911.

Filed in the office of the Territorial Auditor of the Territory of izona this 1 day of February, A. D. 1910, at 10:00 A. M., at re-est of Gibson Taylor, whose postoffice address is Tucson, Arizona.

W. C. FOSTER,
Territorial Auditor.

Indorsed: Pl'tff's Ex. 1 for purpose of identification (5-25-14). tff's Ex. 1 in evidence (5-25-14).

EXHIBIT 4.

39,178—1A.

UNITED STATES DEPARTMENT OF AGRICULTURE,
FOREST SERVICE.
WASHINGTON, April 19, 1909.

es, Crook, Gila Valley, Globe & Northern Ry. Co. (Int.) 11-5-'08.

Received Apr. 22, 1909. C. L. O.

e Commissioner of the General Land Office.

SIR: Your letter "F" RCM (Phoenix 01501) of April 16, en-sing map of right of way applied for by the Gila Valley, Globe & rthern Railway Company, is received and has been referred, h blue print copies of the map, to the District Forester at Albu-erque, New Mexico, in order that he may make the necessary mination and require the applicant to execute such stipulations seem necessary for the protection of National Forest interests. er the applicant executes the stipulations the District Forester l make a report on the matter direct to your office. The tracing mitted with your letter is returned.

Very respectfully,

C. S. CHAPMAN,
Acting Forester.

Enclosure.

(Here follow diagrams marked pages 161*a* and 161*b*.)

162 EXHIBIT 4.

76595.

Registered G. L. O. Jul- 13, 190–.
Referred to ——— ———.
Assigned to ——— ———. NM.
Answered by ——— ———.
———. Noted ———.
———. File ———.

391178-2A.

Phœnix 01501.

United States Department of Agriculture, Forest Service.

District 3.

STRICKLER-LUNA BUILDING,
ALBUQUERQUE, NEW MEXICO, July 6, 1909.

Crook, Use-, Gila Valley, Globe & Northern Ry. Co., Railroad (Interior). Nov. 5, 1908.

The Commissioner of the General Land Office.

SIR: In reference to your letter F-RCM of April 16:

163 The applicant having executed the stipulation required to protect National Forest interests, I have the honor to recommend that its application for a right of way be approved.

Very respectfully,

EARLE H. CLAPP,
Acting District Forester.

Received Jul- 12, 1909.
C. L. O.

Indorsed: Pl'ff's Ex. 5 for purpose of identification. In evidence Pl'ff's Ex. 5. 5-25-14. J. W. W.

164 EXHIBIT 5.

94343.

Sept. 10, '09.

Crook National Forest FRR giving instructions Dec. 11, '09 attached.

330870-1A.

Executive Order, Crook National Forest, Arizona.

Under authority of the Act of Congress approved June 4, 1897 (30 Stat. 34-36), and on the recommendation of the Secretary of Agriculture, it is hereby ordered that the proclamation of July 1,

1908, establishing the Crook National Forest, be modified to reduce the area of such National Forest by eliminating therefrom the following described areas in Arizona, Gila and Salt River Meridian:

In Township One (1) North, Range Fourteen (14) East, the south half of Section twenty-three (23) and Sections twenty-four, (24), twenty-five (25 and twenty-six (26);

In Township One (1), North, Range fifteen (15) East, Section nineteen (19), the west half of Section twenty-nine (29), and Section thirty (30);

In Township Seven (7) South, Range twenty-one (21) East, Sections eight (8), nine (9), ten (10) eleven (11) and twelve (12);

In Township Six (6) South, Range twenty-two (22) East,
165 the east half of Section thirty (30), and the east half of Section thirty-one (31);

In Township Seven (7) South, Range twenty-two (22) East, the east half of Section six (6), and Section seven (7).

The lands hereby excluded from the Crook National Forest which are not embraced in any other withdrawal, reservation, or appropriation, shall be restored to the public domain and become subject to settlement under the general provisions of the homestead laws on such date and after such notice by publication as the Secretary of the Interior may prescribe, but shall not become subject to entry, filing, selection, or other form of appropriation until the expiration of thirty days from the date so fixed, and no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun prior to such date, and all such settlement and occupation are hereby forbidden.

WM. H. TAFT.

The White House, Aug. 27, 1909.

(No. 1125.) DEPARTMENT OF STATE.

Sept. 1, 1909.

A true copy.

J. A. TONNIE,
Act'g Chief, Bureau Rolls and Library.

Indorsed: Pl't'ff's Ex. 6 in Evidence.

[Map.]

166 EXHIBIT A.

Crook National Forest, Arizona.

By the President of the United States of America, a Proclamation.

Whereas, the Mount Graham National Forest, within the Territory of Arizona, was established by proclamation dated July twenty-second, eighteen hundred and ninety-two, and was enlarged to em-

brace a portion of the Fort Grant Military Reservation by Executive Order, dated October sixth, nineteen hundred and six, which also provided for the unhampered use by the War Department of the land described in such Executive Order;

And whereas, it appears that a portion of the Tonto National Forest, all of the Mount Graham National Forest, except the area shown on the attached diagram as eliminated, together with certain lands within the Territory of Arizona not heretofore reserved, which are in part covered with timber, should be known as the Crook National Forest;

Now therefore, I, Theodore Roosevelt, President of the
167 United States of America, by virtue of the power in me vested by the Act of Congress, approved June fourth, eighteen hundred and ninety-seven, entitled "an Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," do proclaim that on and after the first day of July, nineteen hundred and eight, the boundaries of the Crook National Forest shall be as indicated on the attached diagram.

The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws or reserved for any public purpose, be subject to and shall not interfere with or defeat legal rights under such appropriation nor prevent the use for such public purpose of land so reserved, so long as such appropriation is legally maintained, or such reservation remains in force.

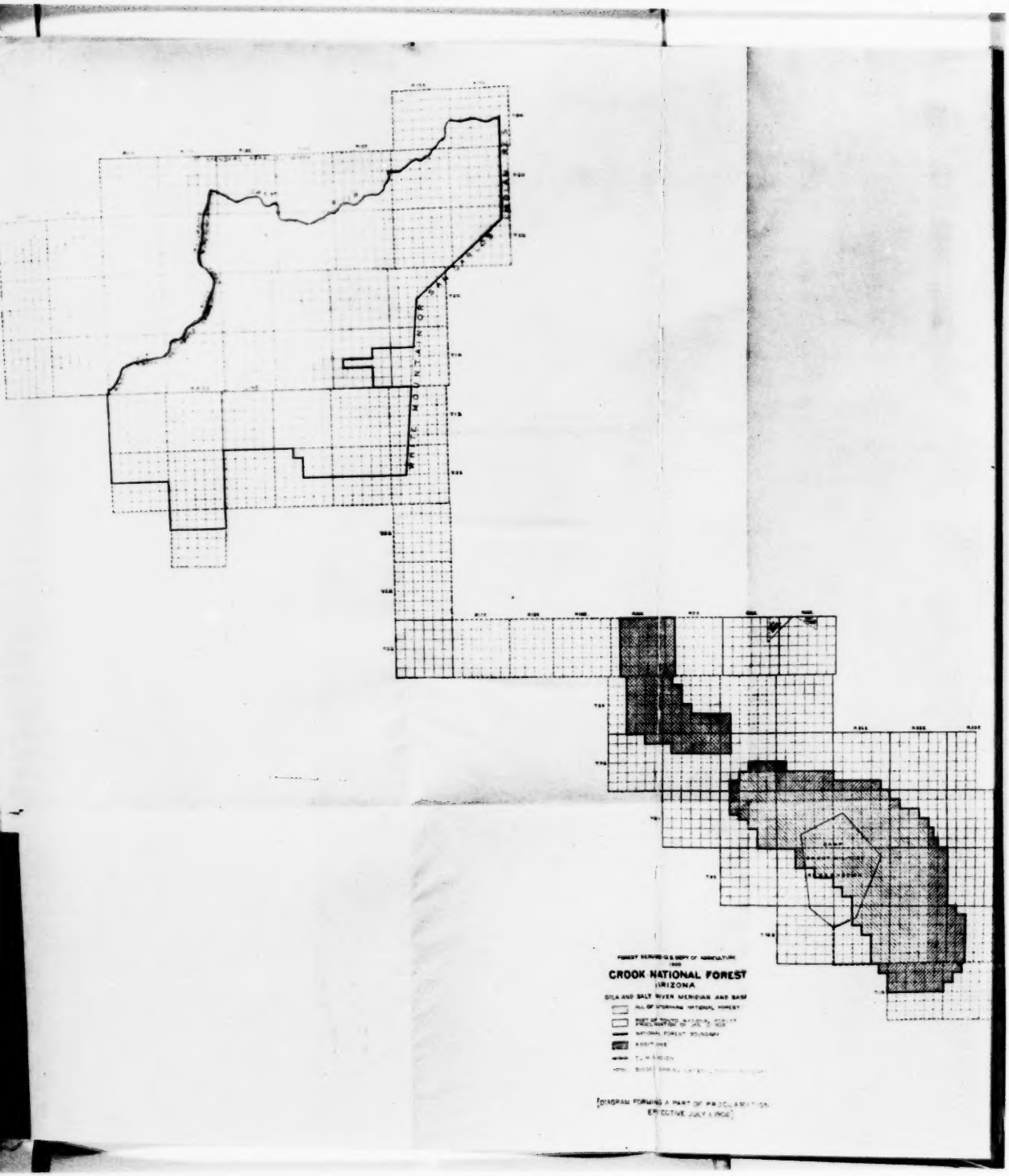
This proclamation shall not prevent the settlement and entry of any lands heretofore opened to settlement and entry under the Act of Congress approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of Agricultural lands within forest reserves;"

The lands hereby eliminated from the Mount Graham National Forest which are not embraced in withdrawals for administrative sites for use in the management of the Forest, or in any other reservation, or appropriation, shall be restored to the public do-
168 main and become subject to settlement under the general provisions of the homestead laws on such date and after such notice by publication as the Secretary of the Interior may prescribe, but shall not become subject to entry, filing, selection, or other form of appropriation until the expiration of thirty days from the date so fixed, and no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun prior to such date, and all such settlement and occupation are hereby forbidden.

It is not intended by this proclamation to release any land from reservation, or to reserve any land except the areas indicated on the attached diagram as added and eliminated.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 1st day of July, in the year


WHITE MOUNTAIN
CROOK NATIONAL FOREST
ARIZONA

of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

[SEAL.] THEODORE ROOSEVELT.

By the President:

ALVEY A. ADEE,
Acting Secretary of State.

(No. 816.)

Indorsed: Rec'd and marked Def't's Ex. A in Evidence.

(Here follows diagram marked p. 168½.)

169 EXHIBIT B.

I, B. F. Galloway, Acting Secretary of Agriculture, do hereby certify that the following and annexed is a true, correct and compared copy of the application under the act of June 11, 1906 (34 Stat., 233) made on June 5, 1909, by Clev W. Van Dyke, for land in the Crook National Forest.

I further certify that the original thereof is in the files of the Forest Service, United States Department of Agriculture, in the City of Washington.

In testimony whereof, I have set my hand and the seal of the Department of Agriculture.

Done at Washington, this 10th day of January, 1914.

[Seal United States Department of Agriculture.]

B. F. GALLOWAY,
Acting Secretary.

170 Copy.

Forest Service.

District 3. Operation Jul. 2, 1909. Received.

Forest Service.

Jun. 28, 1909.—Referred to Occupancy.

United States Department of Agriculture.

Forest Service.

Occupancy Jun. 28, 1909. Referred to Dist. 3.

Forest Service.

Lands Occupancy Jun. 28, 1909. Received.

Forest Service.

District No. 3. Received Jul. 2, 1909. Referred to Operation.

Application under Act of June 11, 1906.

A true, correct and compared copy.

____ ____,
Acting Ass't Forester.

GLOBE, ARIZONA, June 5th, 1909.

Crook 112.

The Forester, Washington, D. C.

I hereby make application for the examination and listing, unde
the Act of June 11, 1906, of the following described lands in th
Tonto National Forest, ... W. .....
S. E. ¼ of S. W. ¼ and S. W. ¼ of S. E. ¼ and N. W. ¼ o
S. E. ¼ and S. E. ¼ of N. E. ¼ excepting portion covere
171 by St. John's Mineral Entries Sec. 30 T. 1 N. R. 15 E. (
and S. R. Base and Meridian (If the land is surveyed, giv
each smallest legal sub-division and the section, township, and rang
If the land is unsurveyed, describe it by reference to natural object
streams, or improvements, with boundary lines sufficiently definit
to identify the land, so that the examiner may easily locate i
When convenient, submit sketch of the land on the township pla
last page).

I am e[illegible]tled to make entry under the homestead laws and th
Act of June 11, 1906. I have actually been upon the land abo
described and believe it to be chiefly valuable for agriculture, havin
examined it, March 21-st, 1909 and almost every day since the
having made frequent visits and am the only person claiming sam
(Give the date of settlement or the date of the examination, th
character of the improvements, if any, and the amount of cleare
land.)

My present address is Globe, Arizona.

(Signed) CLEVE W. VAN DYKE,
Applicant.
CLEVE W. VAN DYKE.

Received Wash. D. C. 6-28-1909, 5 A. M.

NOTE.—If the applicant, upon the request of the Forest Offic
detailed to examine the land, will accompany him, it will usual
facilitate the examination.

Rece'd Washington, D. C. June 28, '09, 5 A. M. Surveyed.

172 *Regulations Governing Application under the Act of June 11, 1906.*

U. S. Department of Agriculture.

Forest Service.

1. Applications must be made upon this form, signed by the applicant, and mailed to the Forester, Washington, D. C.

2. Applicants will secure preference in the order of the receipt of their applications, unless the lands were occupied by bona fide settlers prior to January 1, 1906, in which case the settlers have the preference.

3. The fact that an applicant has settled upon the land will not influence the decision with respect to its agricultural character. Settlement after January 1, 1906, and in advance of the opening by the Secretary of the Interior, is not authorized by the act, confers no rights, and will be considered trespass.

4. If for any reason an application is rejected or withdrawn, application may be made for another tract. Applicants entitled to a preference right under the act will be permitted to occupy the land applied for by them upon making application to the Forest supervisor.

5. Settlement and entry under the act are within the jurisdiction of the Secretary of the Interior, who will determine the preference rights of applicants.

173 APPENDIX A.

An Act to Provide for the Entry of Agricultural Lands Within the Forest Reserves.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Secretary of Agriculture may in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego; which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the list and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this Act.

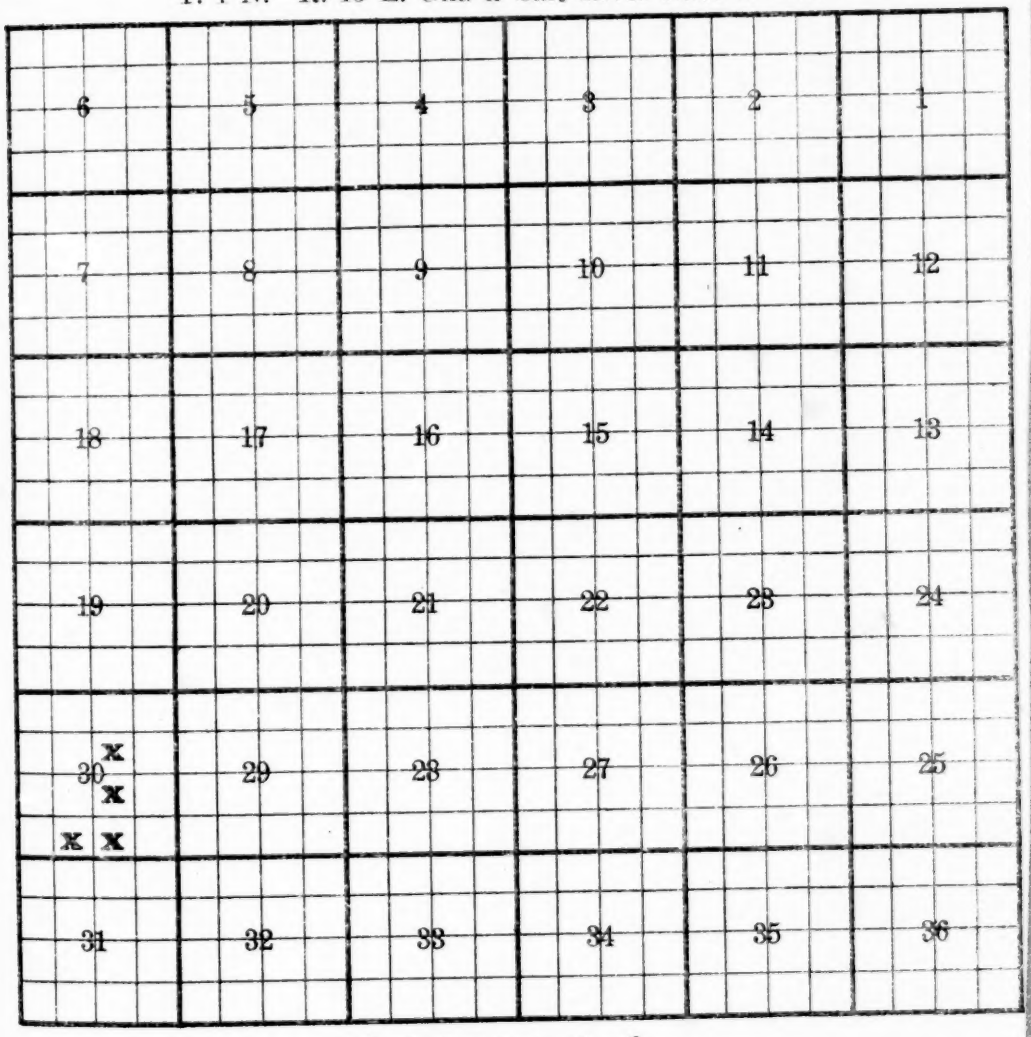
Upon the filing any such lists or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length, at the expiration of

sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the
174 said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated: Provided, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry: Provided further, That any entryman desiring to obtain patent to any lands described by metes and bounds entered by him under the provisions of this Act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of the notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like
175 period: and further, that any agricultural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no land entered under the provisions of this Act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries.

Sec. 2. That settlers upon lands chiefly valuable for agriculture within forest reserves on January first, nineteen hundred and six, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted an additional homestead right of entry for the purpose of this Act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay two dollars and fifty cents per acre for lands entered under the provisions of this act, such payment to be made at the time of making final proof on such lands.

Sec. 3. That all entries under this Act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation, and use of the waters within the said forest reserves for mining, irrigation, and other purposes; and no titles acquired to agricultural lands in said Black Hills Forest Reserve under this Act shall vest in the patentee any riparian rights to any

T. 1 N.—R. 15 E. Gila & Salt River Base & Mer.



Scale One inch=1 mile.

#734
Van Dyke
v.
Arizona Eastern
$178.

176 stream or streams of flowing water within said reserve: and that such limitation of title shall be expressed in the patents for the lands covered by such entries.

Sec. 4. That no homestead settlements or entries shall be allowed in that portion of the Black Hills Forest Reserve in Lawrence and Pennington counties in South Dakota except to persons occupying lands therein prior to January first, nineteen hundred and six, and the provisions of this Act shall apply to the said counties in said reserve only so far as is necessary to give and perfect title of such settlers or occupants to lands chiefly valuable for agriculture and therein occupied or claimed by them prior to the said date, and all homestead entries under this Act in said counties in said reserve shall be described by metes and bounds survey.

Sec. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this Act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve.

Approved June 11, 1906—(34 Stat., 233).

177 *Appendix B.*

An Act Excepting Certain Lands in Pennington County, South Dakota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the following described townships in the Black Hills Forest Reserve, in Pennington County, South Dakota, to wit: Townships one north, one east; two north, one east; one north; two east, two north, two east; one south, one east; two south, one east; one south, two east; and two south, two east, Black Hills meridian, are hereby excepted from the operation of the provisions of section four of an Act entitled, "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six. The lands within the said town-ships to remain subject to all other provisions of said Act.

Approved, February 8, 1907.—(34 Stat., 883).

Indorsed: Def't's Ex. B, subject to ruling to be made. Admitted in Evidence.

[Map.]

(Here follows diagram marked p. 178.)

179 EXHIBIT C.

Copy.

Appendix C.

380313-1.

United States Department of Agriculture, Forest Service.

Application Under Act of June 11, 1906.

GLOBE, ARIZONA, July 26, 1909.

The District Forester, Albuquerque, N. Mex.:

I hereby make application for the examination and listing, under the Act of June 11, 1906, of the following described lands
180 in the Crook National Forest, S. E. ¼ S. W. ¼, S. W. ¼ S. E. ¼, N. W. ¼ S. E. ¼, Sec. 30, T. 1 N., R. 15 E., G. & S. R. B. & M.

I am entitled to make entry under the homestead laws and the Act of June 11, 1906. I have actually been upon the land above described and believe it to be chiefly valuable for agriculture, having settled upon it (or examined it) March, 1909, no improvements on the land.

Desire to demonstrate dry farming on this tract, under special use permit.

My present address is Globe, Arizona.

CLEVE W. VAN DYKE,
Applicant.

Received, Albuquerque, N. M., July 29, 190-, 5:30 A. M.

Indorsed: Def't's Ex. C. subj. to ruling to be made. Adm'd in evidence. J. W. W., Clerk.

181 EXHIBIT E.

Appendix E.

403272-1B.

United States Department of Agriculture, Forest Service.

District No. 3.

Strickler-Luna Building, Albuquerque, New Mexico.

Crook, Settlement, Van Dyke, Cleve W., 112.

Mr. Cleve W. Van Dyke, Globe, Arizona.

DEAR SIR: In further reference to your application for the examination and listing of land in the Crook National Forest.

The local land office reports that the N. W. ¼ S. E. ¼, Section 30, T. 1 N. R. 15 E. is covered by H. E. No. 1654, of F. S. Toombs, made May 21, 1908. It is therefore not subject to application under the Act of June 11, 1906, and your application must be canceled to that extent.

182 The S. E. ¼ S. W. ¼ and the S. W. ¼ S. E. ¼, Section 30, T. 1 N. R. 15 E. however, appear to be vacant and your application may remain of record for this tract. If you wish to amend your application to include with the tract for which you are of record, sufficient contiguous land to make 160 acres, you may do so on the enclosed blank form. In the absence of a reply within 30 days, it will be assumed that you do not care to emend and examination will be made accordingly.

403272-2B.

Mr. C. W. D.

If you conclude not to amend and are satisfied as to the agricultural character of the land applied for and wish to begin cultivation and occupation of it at once, you should apply, in person or by writing, to Forest Supervisor T. T. Swift, Safford, Arizona, for a free special use permit for that purpose.

Very truly yours,

A. O. WAHA,
Acting Chief of Operation.

Enclosure.

Indorsed: Deft's Ex. E. for identification, in evidence.

183 EXHIBIT E.

Appendix D.

403272-1A.

United States Department of Agriculture. Forest Service.

District 3.

Strickler-Luna Building, Albuquerque, New Mexico.

August 2, 1909.

Crook, Settlement, Van Dyke, Cleve W., 112.

Mr. Cleve W. Van Dyke, Globe, Arizona.

DEAR SIR: Your amended application, dated July 26, for the examination and listing of lands under the Act of June 11, 1906, in the Crook National Forest, was received July 29, 1909.

The status of the tract covered by your application has been requested from the local land office, and you will be promptly in-

formed of the action that can be taken as soon as the report of the local land office is received.

Very truly yours,

ALLEN F. PECK,
Acting Chief of Operation.

Indorsed: Def't's Ex. D. for identification. In Evidence.

184 *Appendix F.*

403272-1C.

United States Department of Agriculture, Forest Service.

District No. 3.

Strickler-Luna Building, Albuquerque, New Mexico.

August 10, 1909.

Crook, Settlement, Van Dyke, Cleve W., 112.

Mr. Cleve W. Van Dyke, Globe, Arizona.

DEAR SIR: Your letter of August 6, is received.

You state that the N. W. 1/4 S. E. 1/4, of Section 30, which was covered by Homestead Entry No. 1654 is now vacated. I have requested the Status of this tract from the Phœnix office, and as soon as the report is received from them you will be informed of the action taken in your case.

Very truly yours,

A. O. WAHA,
Chief of Operation.

Indorsed: Def't's Ex. F. for identification, in evidence.

185 APPENDIX H.

403272-1E.

United States Department of Agriculture, Forest Service.

District 3.

Strickler-Luna Building.

ALBUQUERQUE, NEW MEXICO, September 17, 1909.

Crook, Settlement, Van Dyke, Cleve, 112.

Mr. Cleve Van Dyke, Globe, Arizona.

DEAR SIR: Your letter of August 30, is received.

A report from the local office at Phœnix, Arizona, has been

received, and states that the tract applied for by you is vacant and unappropriated.

The Supervisor has been requested to have the tract applied for examined and as soon as a report is received from him you will be duly informed of the action taken in your case.

Very truly yours,

ALLEN WEEK.
Acting Chief of Operation.

Indorsed: Deft's Ex. G. for identification, in evidence.

186 EXHIBIT D.

APPENDIX G.

403272-1D.

Department of the Interior.

United States Land Office.

Phoenix, Arizona.
(Place)
September 2, 1909.
(Date)

Mr. Cleve W. Van Dyke, Globe, Arizona.

DEAR SIR: Referring to your letter of August 30, 1909, I beg to advise you that H. E. No. 1654 is for N½ SE¼, Section 30, T. 1 N., R. 15 E., instead of NW¼ SE¼ of aforesaid section as stated in your letter. The entire SE¼ of the section above referred to is vacant and subject to entry. On November 20, 1908, F. L. Toombs filed relinquishment of H. E. No. 1654 for N½ SE¼ Sec. 30 Twp. 1 N., R. 15 E.

I enclose herewith homestead blank which, if you desire to make application for the above described land, you will have executed before U. S. Commissioner or Clerk of the District Court and
187 return same to me together with proof of listing, I will see that your application is placed of record providing no other application has been received during the interim.

The fees and commission due this office for 10 acres is $6.50; 80 acres $8, and 160 acres $16.

If there is any further information you desire kindly let me know.

Very respectfully,

CHAS. E. ARNOLD, *Receiver.*

Indorsed: Deft's Ex. H. for identification, in evidence.

EXHIBIT F.

Notice of Restoration of Public Lands to Settlement and Entry.
Department of the Interior, General Land Office, Washington, D.

C., September 4, 1909. Notice is hereby given that the public lands in the following described areas which were excluded from the Crook National Forest, Arizona, by Executive order dated August 27, 1909, if not otherwise withdrawn, reserved, or appropriated, will by authority of the Secretary of the Interior be restored to the public domain on November 22, 1909, and become subject to settlement on and after that rate, but not to entry, filing or selection until on and after December 22, 1909, under the usual restrictions, at the United States land office at Phœnix, Arizona; in Township one (1)
188 North, Range fourteen (14), the south half of Section twenty-three (23), all Sections twenty-four (24), twenty-five (25), and twenty-six (26); in Township one (1) North, Range fifteen (15), Section nineteen (19), west half of Section twenty-nine (29), all Section thirty (30); in Township (7) South, Range twenty-one (21), Sections eight (8), nine (9), ten (10), eleven (11), and twelve (12); in Township six (6) South, Range twenty-two (22), east half of Sections thirty (30) and thirty-one (31), in Township seven (7) South, Range twenty-two (22), east half of Section six (6), all Section seven (7), all east of Gila and Salt River Meridian. Warning is hereby expressly given that no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun after September 1909, and prior to November 22, 1909, and all such settlement or occupation is hereby forbidden.

FRED DENNETT,
Commissioner of the General Land Office.

Approved September, 4, 1909:

FRANK PIERCE,
First Assistant Secretary of the Interior.

Indorsed: Def't's Ex. I for identification. Def't's Ex. I in evidence. 5-25-14. J. W. W.

189 EXHIBIT G.

4-1023.

Phœnix 07769.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, a Certificate of the Register of the Land Office at Phœnix, Arizona, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, Cleve W. Van Dyke according to the provisions of the Act of Congress of April 24, 1820, entitled, "An Act making further provision for the sale of the Public Lands," and the acts supplemental thereto, for the Southeast quarter of Section Thirty in Township One North of Range Fifteen East of the Gila and Salt River Meridian, Arizona, containing One Hundred Sixty Acres, according to the Official Plat

of the Survey of the said Land returned to the General Land Office by the Surveyor-General:

Now known ye, that the United States of America, in consideration the premises, and in conformity with the Several Acts of Congress in such case made and provided, has given and granted, and by these presents does give, and grant, unto the said claimant, and to the heirs of the said claimant the Tract above described: To have and to hold the same, together with all the rights, privileges,
190 immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the nineteenth day of February, In the year of our Lord One Thousand Nine Hundred and Twelve and of the Independence of the United States the One Hundred and Thirty-sixth.

By the President.

WM. H. TAFT.
By M. P. LE ROY, *Secretary.*
H. W. SANFORD,
Recorder of the General Land Office.

[Seal United States General Land Office.]

Recorded: Patent Number 248767.

191 25568.

STATE OF ARIZONA,
County of Gila, ss:

I, E. T. Stewart, County Recorder in and for said Gila County, do hereby certify that the within instrument of writing was filed at the request of W. E. Brooks on the 14th day of January, A. D. 1914, at 25 minutes past 4 o'clock P. M., and duly recorded at Page 309, Book 21, Records Real Estate Deeds, Gila County, State of Arizona.

E. T. STEWART,
County Recorder.

Compared.
Indexed.

Indorsed: No. 451-B. Received subject to objection and marked "J." Objection overruled. In evidence.

192 EXHIBIT H.

State of Arizona, Office of the Arizona Corporation Commission.

UNITED STATES OF AMERICA,
State of Arizona, ss:

The Arizona Corporation Commission does hereby certify that the annexed is a true and complete transcript of the Articles of Incorporation of Gila Valley Globe and Northern Railway Company which was filed in the office of the Secretary of Arizona, on the 24th day of January, A. D. 1894 at 9:00 o'clock A. M., as provided by law; and of the amendment to said articles of incorporation which was filed in the office of the Auditor of Arizona on the 27th day of March, A. D. 1905 at 11:00 A. M., as provided by law.

In testimony whereof, The Arizona Corporation Commission, by its Chairman, has hereunto set its hand and affixed its Official Seal. Done at the city of Phœnix, the Capitol this 14th day of March, A. D. 1914.

[SEAL.] ARIZONA CORPORATION COMMISSION,
W. P. GEARY, *Chairman.*

Attest:
FRANK DESOUZA, *Secretary.*

193 Articles of Incorporation of the Gila Valley Globe and Northern Railway Company.

Know all men by these presents: that we, the undersigned, have this day associated ourselves together for the purpose of incorporating, under and in accordance with the laws of the Territory of Arizona; a corporation to be known and called by the corporate name of the Gila Valley Globe and Northern Railway Company.

And we hereby certify that the purposes for which this corporation is formed are: To construct, conduct, own and maintain a railway (and telegraph line in connection therewith) for the transportation of passengers, freight, the mail and express matter, and to receive compensation and tolls therefor.

The said railway is intended to run from a point on the Southern Pacific Railroad, at or near Bowie Station, in Cochise County,
194 Territory of Arizona, into or pass through the Counties of Cochise, Graham and Gila, on the most practicable route to the town of Globe, in the said Gila County, Territory of Arizona.

The estimated length of said railway is about one hundred and twenty-five (125) miles.

Also to acquire, hold, trade in, and use all such real estate and other property as may be necessary for the construction and maintenance of said railway, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of said railway.

That the time of its existence shall be fifty years from and after the date of its incorporation.

That the number of its Directors shall be five, and that the names and residences of those who shall serve until the election of such officers and their qualifications, are:

Names.	Residences.
Julius Liberman	Willcox, Arizona.
Eugene A. Cutter	Bonita, Arizona.
D. Wilmot Wickersham	Bowie Station, Ariz.
I. E. Solomon	Solomonville, A. T.
Alexander C. Laird	Los Angeles, Cal.

195 That the amount of Capital Stock actually subscribed, is the sum of one hundred and thirty thousand dollars ($130,000), being more than one thousand dollars ($1,000) for each and every mile of the proposed railway, and that the same has been subscribed by the following persons:

Names.	No. of shares.	Amount.
Julius Liberman	One Share	$100.00
Eugene A. Cutter		100.00
D. Wilmot Wickersham	One Share	100.00
I. E. Solomon	One Share	100.00
Alexander C. Laird	One Share	100.00
Wm. Garland, One thousand two hundred and Ninety five	shares	$129,500.00

And that at least ten per cent thereof has been paid into the Treasurer of this intended corporation, duly elected by the said subscribers.

That the Capital Stock of the said Company or Corporation is Two Million Dollars, ($2,000,000), divided into Twenty Thousand (20,000) shares of One Hundred Dollars ($100) each, which said sum is the actual contemplated cost of constructing the said rail-
196 way, together with the cost of the right of way, motive power, and every other appurtenance and thing for the completion and running of said railway, as nearly as can be estimated by competent engineers.

In witness whereof, we have hereunto subscribed our names, places of residence, and the number of shares of stock taken by us respectively in said Company:

Names.	Residence.	No. of shares.
Alex. C. Laird	Los Angeles, Cal.	One Share.
Eugene C. Cutter	Bonita, A. T.	One Share.
Julius Liberman	Willcox, A. T.	One Share.
D. Wilmot Wickersham	Teviston, A. T.	One Share.
I. E. Solomon	Solomonville, A. T.	One Share.
Wm. Garland	Los Angeles, Ca..	Twelve hundred and Ninety-five Shares.

In the presence of Lee A. McConnell witness to the Signature of Alex. C. Laird, Witness.

Filed in the office of the Secretary of the Territory of Arizona, this 24 day of Jan. A. D. 1894 at 9:00 A. M.

CHAS. M. BRUCE,
Secretary of Arizona.
By F. B. DEVERAUX, *Ass't.*

197 STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this the 12th day of January, 1894, before me, Lee A. McConnell, a Notary Public, in and for said County, residing therein, duly commissioned and sworn, personally appeared Alex. C. Laird personally known to me to be the person whose name is subscribed to the foregoing instrument and he duly acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office the day and year last above written.

[NOTARIAL SEAL.] LEE A. McCONNELL,
Notary Public in and for the County of Los Angeles, State of California.

198 TERRITORY OF ARIZONA,
County of Cochise, ss:

On this 15th day of January, A. D. 1894, before me, G. W. Baker, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Eugene A. Cutter, Julius Lieberman, D. Wilmott Wickersham, I. E. Solomon and Wm. Garland personally known to me to be the persons whose names are subscribed to the foregoing instrument and they duly acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office the day and year last above written.

[NOTARIAL SEAL.] G. W. BAKER,
Notary Public.

Resolved, That the Articles of Incorporation of the Company be amended as follows:

After the words "The said Railway is intended to run from a point on the Southern Pacific Railroad at or near Bowie Station in Cochise County, Territory of Arizona, into or pass through the Counties of Cochise, Graham and Gila in the most practicable route to the said Town of Globe, in the said Gila County, Territory of Arizona," add the following:

There shall be a branch line commencing at a point on said main line at or near San Carlos and running thence in a general Southwesterly direction to a point at or near the mouth of the San
199 Pedro River in the County of Pinal; and a further branch line commencing at some convenient point on said above

mentioned branch line East of Dripping Springs Wash, and crossing the Gila River to some convenient point on the Arizona Eastern Railroad.

And after the words "One Hundred and twenty-five miles," add as follows:

And of said branch lines forty miles.

We, the undersigned, president and secretary of the Gila Valley, Globe and Northern Railway Company, a corporation duly incorporated and existing under the laws of the Territory of Arizona, do hereby certify that the foregoing is a full, true and correct copy of a resolution of the stockholders of said corporation, unanimously adopted, by stockholders representing nineteen thousand nine hundred eighty three shares of the Capital Stock of said corporation, at a meeting of the stockholders thereof, held in the City and County of Los Angeles, State of California, on the 20th day of March, A. D. 1915, as the same appears of record upon the minutes of the proceedings of said meeting.

In witness whereof, we have hereunto set our hands and affixed the Corporate Seal of said Company at Tucson, in the County of Pima, Territory of Arizona, on the 24th day of March, A. D. 1905.

EPES RANDOLPH, *President.*
A. C. LAIRD, *Secretary.*

[Corporate Seal Gila Valley, Globe and Northern Railway Company.]

200 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me Josie B. Henderson, a Notary Public in and for the County of Pima, Territory, aforesaid, personally appeared Epes Randolph, and A. C. Laird, to me known, and known to me to be the persons described in and who executed the foregoing instrument, as President and Secretary of the corporation described in the foregoing instrument, and acknowledged to me that they executed the same for said corporation for the purposes and consideration therein expressed.

Given under my hand and seal of office this 24th day of March, 1905.

My Commission expires May 29th, 1907.

[NOTARIAL SEAL.] JOSIE B. HENDERSON,
Notary Public.

Filed in the office of the Territorial Auditor of the Territory of Arizona, this 27 day of March, A. D. 1905, at 11:00 A. M.

I. M. CHRISTY,
Territorial Auditor.

Indorsed: No. 451-B. Def't's L. for identification. Objection sustained. Def't's Ex. L. in Evidence. J. W. W., Clk.

201 State of Arizona, Office of the Arizona Corporation Commission.

UNITED STATES OF AMERICA,
State of Arizona, ss:

The Arizona Corporation Commission does hereby certify that Articles of Incorporation of Gila Valley Globe and Northern Railway Company were filed in the office of the Secretary of Arizona on the 24th day of January, A. D. 1894 at 9:00 o'clock A. M., as provided by law; and that amendment to said articles of incorporation was filed in the office of the Auditor of Arizona on the 27th
202 day of March, A. D. 1905 at 11:00 o'clock A. M., as provided by law; and that no other filings appear of record concerning said Gila Valley, Globe and Northern Railway Company, prior to the filing of Articles of Incorporation and Consolidation, filed February 1, 1910.

In testimony whereof, The Arizona Corporation Commission, by its Chairman, has hereunto set its hand and affixed its Official Seal. Done at the City of Phœnix, the Capitol, this 16th day of March, A. D. 1914.

[Seal Arizona Corporation Commission, Phœnix.]

ARIZONA CORPORATION COMMISSION,
W. P. GEARY, *Chairman.*

Attest:
FRANK DE SOUZA, *Secretary.*

Indorsed: Def't's Ex. M for purpose of identification. Objection sustained. Def't's Ex. M. for evidence. J. W. W., Clk.

203 EXHIBIT N.

Original.

This indenture, made this 27th day of September, 1909, between the Miami Land & Improvement Company (hereinafter called Miami Company), a corporation organized and existing under and by virtue of the laws of Arizona, party of the first part, and the Gila Valley, Globe & Northern Railway Company, a corporation similarly organized and existing, party of the second part. (Hereinafter called the Railway Company),

Witnesseth: That the Miami Company is the owner of the hereinafter described lots or parcels of grounds, lode and placer claims all situated in Globe mining district, County of Gila, Territory of Arizona, and more particularly described as follows, to-wit: Lots 4 and 5, bearing serial numbers 0761 and 0633 and comprising what would otherwise be the Northeast and Southwest Quarters of the Southwest Quarter of Section Thirty (30), Township One (1) North Range Fifteen (15) East, Gila and Salt River Base and Meridian, United States patents of which are recorded in the office of the County Recorder of said Gila County, in Book 11, Page 529 Deeds of Real Estate, Venus Unpatented Placer Claim, Book 8 Page 402, Venus Lode Claim, Book 19, Page 345; Copper Center

unpatented Lode Claim, Book 12, Page 372, Record of Mines; Copper Center unpatented Placer Claim, Book 8, Page 441, Gila Monster unpatented Placer Claim, Book 8, Record of Mines, Page 403.

204 That whereas the Railway Company is desirous of procuring the hereinafter described right of way over and across said lots and claims, both lode and placer, for the construction and maintenance of a line of railway, and the Miami Company is desirous of having and maintaining a railway station at a point hereinafter designated;

Now therefore, this agreement further witnesseth: That the parties hereto in consideration of the foregoing premises, and for the promises, conditions and covenants hereinafter set forth, and to be performed and kept by them, do hereby agree as follows:

That the Miami Company has and by these presents does remise, release and quit-claim unto the Railway Company, its successors and assigns, a right of way for the construction, maintenance and operation of one or more lines of railway, with spurs and side tracks, poles and wires and all buildings, platforms and structures requisite or convenient for the proper carrying on of business for the railway, with the right to take and use such earth and rock within said right of way as may be needed in the construction of said railway and other work provided for.

The right of way hereby remised, released and quit claimed is a strip of land of varying widths as included in the red lines of the blue print marked Exhibit "A" and made a part hereof. The said right of way is more particularly described as follows, to wit: The said right of way hereby remised, released and quit-claimed

205 is a strip of land of varying widths lying over, across and upon the above described lots of Unpatented Lode and Placer Claims. The said strips of land are located relative to center line of the Gila Valley Globe & Northern Railway's survey of what is known as the extension from Globe to Miami as follows:

First. A strip of land of uniform width of one hundred (100) feet, fifty (50) feet on each side of said center line, between Engineer's Stations 475 x 67.7 and 480 x 00.

Second. A strip of land of a uniform width of one hundred twenty (120) feet fifty (50) feet on the south side and seventy (70) feet on the north side of said center line, between Engineer's Stations 480 x 00 and 481 x 00.

Third. A strip of land of uniform width of one hundred (100) feet, fifty (50) feet on each side of said center line, between Engineer's Stations 481 x 00 and 486 x 50.

Fourth. A strip of land of a uniform width of one hundred fifty (150) feet fifty (50) feet on the south side and one hundred (100) feet on the north side of said center line, between Engineer's Stations 486 x 50 and 496 x 50.

Fifth. A strip of land of a uniform width of one hundred (100) feet, fifty (50) feet on each side of said center line, between Engineer's Stations 496 x 50 and 502 x 55.17, said last mentioned En-

gineer's Station being located on the north side line of what is known as the Myrtle Mining Claim, in said Mining District.

Sixth. A strip of land of a uniform width of one hun-
206 dred (100) feet, fifty (50) feet on each side of said center line, between Engineer's Stations 506 x 25 and 525 x 91.0 said Engineer's Station 506 x 25 being located on the east line of the Southwest Quarter of the Southwest Quarter of said Section Thirty (30) seventy-six (76) feet southerly from the Northeast corner of said subdivision and said Engineer's Station 525 x 91.0 being located on the south sideline of what is known as the Show Me No. Two (2) Mining Claim in the said Mining District, a point thirty-eight (38) feet southwesterly from the most easterly corner of said last mentioned claim.

The surveyed center line to which the above described strips of land are located relatively being described as follows: Beginning at a point on the Southwest side line of what is known as the "Miami Number Four" Mining Claim in the said Globe Mining District, said point of beginning being four hundred nineteen (419) feet Westerly from Southeast corner of said "Miami Number Four" Claim, thence by a tangent the course of which is South fifty One (51) degrees and Forty Four (44) Minutes West, a distance of seven hundred seventy-one and four-tenths (771.4) feet to a point; thence by curve to the right of varying radii a distance of twelve hundred ninety-three and three-tenths (1293.3) feet; thence by a tangent the course of which is South Seventy-three (73) degrees and twenty-four (24) minutes West, a distance of thirty-four and twenty-five hundredths (34.25) feet; thence by a curve to the left of varying radii a distance of four hundred ninety seven and
207 nine hundredths (497.09) feet to a point; thence by a tangent the course of which is South Thirty-two (32) degrees and Forty-One (41) minutes West, a distance of two and four tenths (2.4) feet to a point; thence by a curve to the right of varying radii a distance of eighty-nine (89) feet to a point on the north side line of the aforementioned Myrtle Mining Claim, a distance of one hundred ninety-six and five tenths (196.5) feet westerly from the most easterly corner of said claim; thence by a continuation of last mentioned curve of varying radii to the right, a distance of three hundred sixty-nine and eighty-three hundredths (369.83) feet to a point on the east line of aforementioned Southwest Quarter of the Southwest Quarter of Section Thirty (30) at said aforementioned Engineer's Station 506 x 25, said last mentioned point being located seventy-six (76) feet south of the Northeast corner of said last mentioned sub-division; thence by a continuation of the last mentioned curve to the right of varying radii, a distance of twenty-four and thirty-seven hundredths (24.37) feet to a point; thence by a tangent the course of which is South Seventy-two (72) degrees and no minutes West, a distance of sixty-two and eight-tenths (62.8) feet to a point; thence by a curve to the left of varying radii a distance of three hundred sixty-three and eight tenths (363.8) feet to a point; thence by a tangent the course of which is South Forty-four (44)

degrees and thirty-seven (37) minutes West, a distance of six hundred sixty-five and eight tenths (665.8) feet to a point: thence by a curve to the left of varying radii a distance of four hundred
208 sixty-two and eight tenths (462.8) feet to a point; thence by a curve to the right of varying radii a distance of two hundred and ten and two tenths (210.2) feet to a point on the south line of the aforementioned Southwest Quarter of the Southwest Quarter of Section Thirty (30), a distance of one hundred and five tenths (100.5) feet easterly from the Southwest corner of said subdivision, thence by a continuation of the last mentioned curve of varying radii to the right a distance of one hundred seventy-six and twenty three hundredths (176.23) feet to a point on the south side line of aforementioned Show Me No. Two (2) Mining Claim, thirty-eight (38) feet southerly from the most easterly corner of said claim.

The right of way hereinabove described is remised, quit-claimed and released, subject to the following limitations and conditions:

First. The Miami Company saves and excepts out of the right of way hereby mentioned, all mines and minerals under the premises hereby quit-claimed, with a right to the grantor, its successors and assigns to take all usual, necessary and convenient means for mining and removing all ores and minerals, without interfering with the construction or operation of said railway.

Second. The Railway Company shall provide highway crossings over its right of way and tracks at Engineer's Stations 495x82 and 517x41.77 B. C. and shall grade an approach to its station grounds on the North side of same opposite Engineer's Station
209 492x10, said Engineer's Stations being in accordance with the stationing shown upon said accompanying maps.

Third. The Railway Company shall erect and maintain, at its own expense, a railway station or depot at a point between Engineer's Stations 492 and 494, as indicated upon the hereinafter mentioned blue print.

Fourth. That the Railway Company shall, after the commencement of operation of its railway, thereafter operate such railway continuously unless cessation of operation is caused by an act of God, including washouts, washovers and strikes and other causes beyond the control of the Railway Company.

The Railway Company further covenants and agrees for its successors and assigns that upon any breach of the conditions set forth, the Railway Company shall forfeit its right of way and possession thereof and easement of right of way hereinabove provided for shall be extinguished and such title as the Railway Company may have in and to the premises, shall revert to the Miami Company, its successors and assigns, who may immediately re-enter with or without the process of law, upon the premises above described and every part or parcel thereof and dispossess the Railway Company, its successors and assigns and hold same as of former estate, anything herein contained to the contrary notwithstanding, and the Miami Company, its successors and assigns may, at its

option, enjoin the commission or continuance of any of the
210 acts or things hereinbefore prohibited or exercise either or both remedies.

To have and to hold the premises above described with all and singular the hereditaments hereunto belonging and anywise appertaining to the Railway Company, its successors and assigns subject to the conditions and limitations and restrictions so long and no longer than such right of way shall be used for railroad purposes.

In Witness Whereof, The Miami Land and Improvement Company by resolution duly adopted has caused these presents to be executed and its corporate seal to be hereunto affixed; and the Gila Valley Globe & Northern Railway Company has caused these presents to be duly executed and corporate seal hereunto affixed by its duly authorized agents, the day and year above written.

[Seal Miami Land and Improvement Co., Inc.]

MIAMI LAND & IMPROVEMENT COMPANY,
By PATRICK ROSE, *Vice-President.*
By J. W. WENTWORTH, *Secretary.*

[Seal Gila Valley Globe & Northern Railway Company, Bowie, Ariz. Incorporated Jan'y 1894.]

GILA VALLEY GLOBE & NORTHERN RAILWAY COMPANY,
By EPES RANDOLPH, *President.*
By CHAS. E. WALKER, *Secretary.*

211 TERRITORY OF ARIZONA,
County of Gila, ss:

Before me, F. F. Towle, Notary Public, in and for the County of Gila, Territory of Arizona, on this day personally appeared Patrick Rose and J. W. Wentworth, known to me to be the persons whose names are subscribed to the foregoing instrument as Vice-President and Secretary respectively of the Miami Land & Improvement Company, a corporation, and as such Vice-President and Secretary respectively they acknowledged to me that they executed the same for the purpose and consideration herein expressed.

Given under my hand and seal of office this 27th day of September, A. D. 1909.

[Seal F. F. Towle, Notary Public Gila County, Ariz.]

F. F. TOWLE,
Notary Public.

My Commission expires Sep. 10th, 1910.

212 TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, Josie B. Henderson, Notary Public, in and for the County of Pima, Territory of Arizona, on this day personally ap-

peared Epes Randolph and Chas. E. Walker, known to me to be the persons whose names are subscribed to the foregoing instrument as President and Secretary respectively of the Gila Valley Globe & Northern Railway Company, a corporation, and as such President and Secretary respectively they acknowledged to me that they executed the same for the purpose and consideration herein xpressed.

Given under my hand and seal of office this 11th day of October, A. D. 1909.

[Seal Josie B. Henderson, Notary Public, Pima Co., Ariz.]

JOSIE B. HENDERSON,
Notary Public.

My Commission expires May 9-1911.

[Blue Print attached here.]

213 Filed and recorded at the request of C. D. Reppy on the 14 day of October, A. D. 1909 at 05 minutes past 11 o'clock A. M.

E. T. STEWART,
County Recorder.

STATE OF ARIZONA,
County of Gila, ss:

I, E. T. Stewart, County Recorder in and for the County of Gila, State of Arizona, do hereby certify that the foregoing is a full, true and correct copy of the Indenture between Miami Land & Improvement Company, a corporation, and the Gila Valley, Globe & Northern Railway Company, a corporation, as the same appears of record in my office in Book 11, Deeds to Real Estate, at Page 637, with the exception of map attached thereto; that I have compared same with the original record and that same is a true transcript and of the whole thereof.

Given under my hand and seal of office this 26th day of May, A. D. 1914.

[Seal Recorder, Gila County, Ariz.]

E. T. STEWART,
County Recorder, Gila County, Arizona.
By KATHERINE S. POLLAK,
Deputy County Recorder.

Indorsed: Defendant's Ex. N. for identification. Received in Evidence and marked Ex. N. 5-26-14, J. W. W.

214

EXHIBIT O.

Appendix 1.

403272-1F.

November 2, 1909.

Crook-Settlement, Van Dyke, Cleve W., 112.

Mr. Cleve W. Van Dyke, Globe, Arizona.

DEAR SIR: In further reference to your application for land in the Crook National Forest:

The tract of land covered by your application has been eliminated from the Crook National Forest by proclamation of August 27, 1909, and is no longer under the jurisdiction of the Forest Service. Your application is, therefore, rejected.

You are respectfully referred to the Commissioner of the General Land Office for further information concerning this tract.

Very truly yours,

W. O. WAHA,
Chief of Operation.

Indorsed: Def't's Ex. O. in Evidence. 5-26-14. J. W. W.

(Here follows diagram marked page 214½.)

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215 (Title of Court and Cause.)

Notice of Appeal.

Notice is hereby given that the above named Defendants, Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and Patrick H. McGuire, appeal to the Supreme Court of the State of Arizona from the judgment rendered in said Court in the above entitled cause, on the 12th day of September, 1914, in favor of the above named Arizona Eastern Railroad Company, a corporation, Plaintiff, and against the said Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and Patrick H. McGuire, Defendants, and from the whole thereof; and

Notice is likewise given that the above named defendants appeal from the order overruling their motion for a new trial in said above entitled cause made and entered on the 30th day of November, 1914, to the said Supreme Court of the State of Arizona.

SLOAN & WESTERVELT,
F. C. JACOBS,
Attorneys for Defendants

Filed Jan. 2, 1915. J. W. Wentworth, Clerk.

216 In the Supreme Court of Arizona.

No. 1470.

CLEVE W. VAN DYKE and IDA A. VAN DYKE, His Wife, and PATRICK H. MCGUIRE, Appellants,

vs.

ARIZONA EASTERN RAILROAD COMPANY, a Corporation, Appellee.

Appeal from a judgment of the Superior Court of the County of Gila. G. W. Shute, Judge. Affirmed.

Messrs. Sloan & Westervelt, of Phœnix, and Mr. F. C. Jacobs, of Globe, for Appellants.

Messrs. Rawlins & Little, of Globe, for Appellee.

217 Ross, *C. J.*:

Action by appellee railroad company to quiet title to right of way extending across the N. W. ¼ of the S. E. ¼ of Section 30, Township 1 North, Range 15 East, Gila County, the appellant, Cleve W. Van Dyke being the homestead patentee of said premises from the government of the United States. Fifty feet on each side of the center line of the track, or one hundred feet of the right of way, are not involved in this suit. The area in question being the excess of one hundred feet up to two hundred feet, amounting to 2.23 acres. The case was tried to the court without a jury and

judgment entered quieting appellee's title as prayed. The Court made findings of fact which we condense below, together with such other facts as we deem essential to a determination of the case:

The appellee, a railroad corporation, succeeded the Gila
218 Valley, Globe & Northern Railway Company, and acquired all its rights, property, franchises, rights of way and all of its other assets. In March, 1906 the Gila Valley, Globe and Northern Railway Company surveyed and platted a line of railroad from Globe to Miami, Arizona, about nine miles in length, passing over and across certain public lands, and thereafter, on November 5th, 1908, filed in the local land office its map or profile of definite location of its railroad under the Act of Congress of March 3rd, 1875. Prior to the filing of said map or profile, to-wit, July 1st, 1908, under executive order the land covered by map or profile as well also the land in dispute was thrown into the Crook National Forest Reserve. April 19th, 1909 the Gila Valley, Globe & Northern Railway Company made application to the Commissioner of the General Land office for permission to enter the Crook National Forest Reserve and on the 6th day of July was granted permission to go into, over and upon the National Reserve and to locate and to construct its said railroad thereon. The map and profile of its railroad was approved September 21st, 1909 by the Secretary of the Interior pursuant to the Act of Congress approved March 3rd, 1875.

The Gila Valley, Globe & Northern Railway Company
219 commenced in April, 1909 the construction of its railroad and completed the same in September, 1909, and it and appellee has operated its trains ever since October 5th, 1909. Before construction was commenced, on, to-wit, November and December, 1908, the Gila Valley, Globe & Northern Railway Company amended its line of survey and changed the course of said line and located it upon and across the lands described in the complaint, marked and staked the amended lines and right of way on the ground along the entire length of said premises to the extent of one hundred feet in width on each side of the center line of said railroad so located. The road was constructed on the amended location conforming on the ground to the staked and marked line.

At the time of the amended location and at the time of the construction of the road and until November, 1909, the premises in dispute were held by the Miami Land and Improvement Company, a corporation, as mineral land by regular location, and on September 27th, 1909 the Gila Valley, Globe & Northern Railway Company accepted a deed from the Miami Land and Improvement Company conveying to it a right of way across the premises in question in width fifty feet on each side of the center of track and across the entire length of premises.

The land in dispute was, by executive order, restored to
220 the public domain and became open to settlement on December 22nd, 1909, on which date appellant, Cleve W. Van Dyke, filed upon the same under the homestead law. He had theretofore occupied the same under an option to purchase it as a

mineral location from the Miami Land and Improvement Company. On that date he went off the ground but immediately returned establishing residence with a view of homesteading. In due course he made final homestead proof and on February 12th, 1912 a patent without any reservation was issued to him for his homestead. December 30th, 1909 the Gila Valley, Globe & Northern Railway Company filed its amended map and profile of its right of way in the local land office which was regularly and duly approved March 4th, 1911.

Appellant, Cleve W. Van Dyke, attempted to show that he established residence upon the premises prior to December 22nd, 1909, the date upon which he filed his homestead entry. It is clear that he did not go upon the premises prior to the inclusion of the land in the Forest Reserve. He was on the land under an option from the Miami Land and Improvement Company, claiming it as mineral ground, for some time prior to the date of his homestead filing; he attempted to show that he was there under a verbal permit from the Forest supervisors and with the intention of entering
221 the land under the homestead law and he did actually make application to the Forestry Department for an examination and listing thereof under the Act of June 11th, 1906; application, however, was rejected. That he did not rely upon the settlement prior to December 22nd, 1909 is clearly shown by his own testimony. He said "It is a fact that about midnight on the 22nd of December, 1909, I took up my residence in the house testified to. That is, I went off the ground and back on again at midnight." December 22nd was the first time this piece of land could have been settled upon without permission from the National Government, and this permission he did not obtain.

The date that the appellee's rights attached to the right of way is the principal question involved. It is the contention of the appellee that its rights were fixed and established in August and September, 1909, when it completed the construction of its railroad. Appellants contend that because it changed its route as located by the original map and profile and approved by the Secretary of the Interior, and placed its line of railroad on a different route than that called for, it could have initiated and acquired no rights until it filed with the local land office on December 30th, 1909 its amended map of location, and that that came too late, appellant, Van
222 Dyke, having already appropriated the land, especially as against the railroad company, on December 22nd, 1909 by taking it as a homestead. It is conceded, as we understand it, by the appellants that if the lands through which the appellee constructed its right of way had been at the time public lands of the United States, the appellee was not bound to follow the lines as shown by its map and profile, but was at liberty to construct its railroad upon any other of the public lands along the general course of the original survey. It is said, however, that after the approval of the map and profile and before the road was constructed the land in question, together with much other land in that community, was

thrown into the National Forest Reserve and that this changed the rights of the appellee and restricted it to a specific right of way, to-wit, the one shown by its approved map and profile, or, if changed to another and different route, it should have been with the consent of the Interior Department and upon its permission and that since no such permission to construct a road through the disputed land was obtained, the appellee acquired no rights, at least against the appellants, by virtue of the building of a road thereon.

A right of way over the public lands may be obtained in two ways:

223 1. The actual construction of the road;

2. Upon the approval of the Secretary of the Interior after the definite location and filing of the profile of the road in the local land office.

Jamestown & N. R. Co. v. Jones, 177 U. S. 125;

Minnesota, St. P. & S. Ste. M. R. Co. v. Doughty, 208 U. S. 251;

Stalker v. Oregon S. L. R. Co., 225 U. S. 143;

Barlow v. Northern Pacific Ry. Co., 60 L. Ed. — (Advance sheet, April, 1916, U. S. Supreme Court).

This is the construction given by the courts to the Act of Congress of March 3rd, 1875, which was a general law providing the manner by which rights of way might be obtained over public lands of the United States. March 3rd, 1899 (30 Stats. 1233) Congress passed an act supplementing in a way the act of March 3rd, 1875, authorizing the Secretary of the Interior to permit the acquisition of rights of way over the Forest Reservation. The statute reads as follows:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

Speaking of the meaning to be given to the above pro-
224 vision, in Chicago, M. & St. P. Ry. Co. v. United States, 218 Fed. 288-297, the Court said:

"It is somewhat obscure, and just what Congress intended to accomplish by its adoption is not readily apparent; but one thing seems to be of clear intendment, and that is that the Secretary of the Interior shall only file and approve surveys and plats of rights of way when in his judgment the public interests will not be injuriously affected. In other words, the Secretary of the Interior is made the arbiter as to when such surveys and plats shall be approved, and without such approval it is plain that a railroad company cannot acquire a right of way across a forest reserve. If in his judgment the public interests would be injuriously affected, it would seem he could prevent, by refusal to approve the surveys and plats, any occupation of the reservations for right of way purposes. Having the power to prevent, it would seem to follow that he also has the power to approve surveys on conditions that would provide

ainst threatened injury to the public interests, and also afford lief and reimbursement against such as might actually be sus-ined.

"Acting upon this principle, the Secretary of the Interior has, for e exercise of his judgment in the premises, heretofore adopted and ɔmulgated certain rules and regulations and prescribed certain nditions calculated to safeguard the public interests in that regard. hese require of the applicant for a right of way a stipulation that e right of way shall not be so located as to interfere with the proper cupation of the reservation by the government. * * *

"No construction can be allowed until an application for the right way has been regularly filed in accordance with the laws of the nited States and has been approved by the Department, or has en considered and permission specifically given. The regula-ons have since been changed, so that the applicant must enter ito stipulation and execute such bond as the Secretary of Agri-culture may require for the protection of such reserves."

25 In this case, inasmuch as the railroad company was granted a permit to enter upon the Crook National Forest eserve and construct a road it must be assumed that it conformed ith all the rules and regulations of the Department and that it as rightfully upon the reservation and constructed its roadbed and id its rails across the land in dispute with the sanction and per-ission of the properly constituted authorities. The soundness of is assumption is impregnable when we take in connection with ie permission to enter into the reservation the approval of the map f definite location by the Secretary of the Interior. We have been nable to discover any regulation requiring that the applicant for right of way over a National forest should accompany it with a ap and profile definitely fixing and placing the location of the ght of way. The practice in the present case, of granting permis-ion upon the original map and profile, is very strong and convinc-ng proof that no such regulation existed at the time the permission as granted.

The permission to the appellee to enter the forest reserve and onstruct its road having been granted on the 19th of April, 1909, t was in the months of August and September, when it con-structed its road, acting within its legal rights in definitely

26 locating its right of way "by the actual construction of the road." When the question as to whether the actual con-truction of the road caused the title of the right of way to be vested n the railroad company was before the Supreme Court in James-own & N. R. Co. v. Jones, supra, Justice McKenna used this lan-uage:

"The ruling gives a practical operation to the statute, and we hink is correct. It enables the railroad company to secure the grant y an actual construction of its road, or in advance of construction y filing a map as provided in Section four (Act of March 3rd, 875). Actual construction of the road is certainly unmistakable vidence and notice of appropriation."

In this opinion is quoted with approval what Secretary Vilas said in Dakota Central R. R. Co. v. Downey as follows:

"'As to the roadway the construction of the road fixes the boundaries of the grant, and fixes it by the exact rule of the statute.'"

Some point is endeavored to be made by appellants from the fact that the land in dispute was covered by a regular mining location and that the railroad company purchased from the mineral claimant a right of way fifty feet on each side of the center of the track through the entire forty. That the railroad company, having indicated by its purchase what it needed for its right of way, ought to be limited to that; if two hundred feet were necessary for a
227 right of way, it could have bought it or condemned it if necessary.

As long as the ground in dispute retained its status as a valid mining location, unquestionably the appellee's right of way was limited to its purchase of fifty feet on each side of the center of the track, but it was abandoned as a mining claim and immediately upon its abandonment it reverted to the public domain. Appellant, Van Dyke, had an option upon it as a mining claim and subsequently bought it as such, but even before the appellee had constructed its road over it he had made application to the Land Department to have it examined and segregated from the forest reserve so that he might file a homestead thereon. The further fact that it was subsequently homesteaded as agricultural land satisfies us that there was not at the time it was being held as mineral land any known mineral deposits thereon.

The railroad company at the time that it surveyed and mapped its right of way over the land staked and marked one hundred feet on each side of the center of the track. Thus, even while purchasing peace from the mineral claimant for a limited right of way, it was clearly and visibly claiming two hundred feet.

We agree with the lower court and with counsel of appellants that the equities of the case would seem to be with the home-
228 stead claimant, but equity must follow the law. Under the law, if the appellee is entitled to any right of way whatever, it is entitled to one hundred feet on each side of the center of its track.

Congress itself has fixed the amount of the grant and determined what amount was reasonable and necessary for a railroad right of way. This was properly a legislative function and cannot be reviewed by the courts. Congress had the power to give a right of way as wide or narrow as it saw fit. Having said that it should be one hundred feet on each side of the center of the track, it may be no more nor less.

Oregon Short Line R. Co. v. Quingley, 80 Pac. 401;
Northern Pac. R. R. Co. v. Smith, 171 U. S. 260;
Northern Pac. Ry. Co. v. Townsend, 190 U. S. 267;
Moran v. Chicago B. & Q. R. Co., 120 N. W. 192;
Central Pac. Ry. Co. v. Droge, 151 Pac. 663.

Appellee's rights were not initiated on the 30th of December, 1909, when it filed its amended map and profile with the local land office, but long anterior to that, to-wit, in the months of August and September, when it actually constructed its road. The appellant homesteader could not complain if the railroad company had
229 never filed a map with the local land office showing the definite location of its right of way. As was said in Oregon Short Line R. Co. v. Quingley, 80 Pac. 401:

"There could be only two purposes served by the filing of the map under the provisions of this section (Section 4, Act of March 3rd, 1875)—the one for the information of the government and its land office officials to appraise them of the occupation and disposition of the public lands belonging to the government; the other purpose for the information of settlers and purchasers who desire to acquire rights in such public lands. In this case the government is not complaining of such failure, and it does not appear upon what theory a settler can be heard to complain of the failure to perform an act by another which is solely for the information and benefit of the government."

The appellants also insist that the appellee was not qualified under its charter to construct a road from Globe to Miami, Arizona, for the reason that its charter failed to designate such a line as within the project for which it was incorporated. The act of March 3rd, 1875, provides for the grant of rights of way through the public lands of the United States to any railroad duly organized under the laws of any state or territory or by Congress, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization under the same, to the extent of one hundred feet on each side of the central line of said road.
230 The record shows that the appellee made due proof before the Secretary of the Interior of its organization under the laws of the Territory of Arizona; that its application for a right of way was duly approved by the Interior Department and that it entered upon the forest reserve and constructed its road with the permission of the duly constituted authority, and that all of these acts were done before the appellant homesteader had initiated any lawful claim to the land. His rights must date from the 22nd of December, 1909, the date upon which he made his application to file upon the land as a homestead. His occupation of the land before that date was tortious if not claimed under a valid mineral location. The land, in fact, was held by his predecessor and himself until midnight December 22nd, 1909, as a mineral claim, at which time he went off of the land and immediately returned and established a homestead residence; this homestead right, which was finally perfected into a patent, was initiated then on the 22nd of December, 1909, and not before. He can claim no interest in the land by reason of a mineral location, for that had been abandoned and he had no interest in the land as a homesteader at the time the appellee constructed its road.

In Oregon Trunk Line v. Deschutes R. Co., 172 Fed. 739,
231 it was objected that the grantee of the right of way was not competent under the law to receive such a right of way be-

cause it was a Nevada corporation "organized under a law which prohibits it from building or owning or operating a railroad in the state of it's creation" and therefore not authorized or empowered to build a railroad in the State of Oregon and had no capacity to take the grant in question. The Court, in passing upon the point raised and others of a kindred nature, said:

"The defendant, however, is not in a position to raise any of these questions. It had no title or interest in the property at the time the map was approved which was affected thereby. The Secretary of the Interior had jurisdiction and authority to dispose of the public domain, and his approval of the plaintiff's map was equivalent to the issuance of a patent to the land, and cannot be challenged by one who is not in privity with the government, or who had not acquired a right to be preferred in the acquisition of the land before such approval. 'To enable one to attack a patent from the government,' says Mr. Justice McKenna, 'he must show that he himself is entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.' Duluth & Iron Range R. R. v. Roy, 173 U. S. 590, 19 Supp. Ct. 550, 43 L. Ed. 820. See, also, Deweese v. Reinhard, 61 Fed. 777, 10 C. C. A. 55; Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30."

The appellants not being able to connect themselves with the title to this piece of land at the time that the appellee constructed
232 its road, and it not appearing that they were then interested in the land under the claim or right now asserted, it follows that they had no interest that would entitle them to question the decision of the Secretary of the Interior holding that the appellee possessed the capacity to accept the grant.

The judgment is affirmed.

HENRY D. ROSS,
Chief Justice.

We concur:

ALFRED FRANKLIN, *Judge.*

——— ———, *Judge.*

CUNNINGHAM, J. (Dissenting):

The issues of fact raised upon the Answer are: Whether the railroad company at any time used and enjoyed its said right of way to the extent of one hundred feet on each side of the center of its railroad tracks, including the 2.23 acres in controversy; and, Whether the land was public in character at the time the railroad company constructed its road, and, Whether the railroad acquired a right of preference over appellants under the grant by the construction of its road?

233 Defendants set forth their title based upon the homestead settlement and filing by Cleve W. Van Dyke made on December 22nd, 1909, and compliance with the homestead laws of the United States culminating in a patent issued February 12th, 1912, and pray that their title be quieted.

The Supreme Court of the United States in Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, decided, "(1) That a railroad company becomes specifically a grantee under the act of 1875 by filing its articles of incorporation and due proof of its organization under the same with the Secretary of the Interior.

"(2) That the lands granted were identified by a definite location of the right of way, and, sustaining the contention of the railroad that definite location could be made by actual construction of the road, against the decision of the lower courts that such location could only be made by a profile map of the road, we said that the contention gives practical operation to the statute, and enables the railroad company to secure the grant by an actual construction of the road, or, in advance of construction, by filing a map as provided in section 4.

"(3) Actual construction of the road is certainly unmistakable evidence and notice of appropriation."

234 So that Court explained its decision in Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty, 208 U. S. 251, 52 L. ed. 474, 477. In this last case the Court says:

"But section 4 gives little play to construction or the analogies which the company invoke. That section determines the priority of rights between railroads and settlers by explicit language. A right of way is granted, but to secure it three things are necessary: (1) Location of the road; (2) filing a profile of it in the local land office; and (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad and subjects the disposition of the land, under the land laws, to that right. 'And thereafter,' are the words of the statute, 'all such lands over which such right of way shall pass shall be disposed of subject to such right of way.'"

In Stalker v. Oregon S. L. R. Co., 225 U. S. 143, 56 L. ed. 1027, 1032, the Court explains its meaning by the use of the last quoted language, thus:

"Neither should the case of Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty, be regarded as construing the 4th section of the act as holding that, pending the approval of a map of final location, any right may be initiated which will be superior to the title which vests upon such approval. No such question was involved in that
235 case. What is said in the opinion about the grant of a right of way being dependent upon the doing of three things,—location of road, filing profile of it in the land office, and the approval thereof by the Secretary of the Interior,—and that 'thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way,' refers to the nonvesting of any right as against the United States, and not as denying the priority of right in the acquisition of the premises as between parties, growing out of priority of application." Continuing the Court says: "* * * It has been many times ruled that while no vested right against the United States is acquired until the actual approval of the list of selections (under State land grant laws requiring selec-

tion of lands by the State), the company does acquire a right to be preferred over such an intervener. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later."

Holding also that the same rule applies to location of rights of way granted by the Act of 1875.

Consequently in this case to recover the plaintiff must establish not only that it was a qualified grantee under the Act of 1875, and furnished due proof thereof: that it definitely located its grant on public lands offered: that it filed a profile map of such definite location of its road in the land office of the proper district: that
236 such map received due approval of the Secretary of the Interior, but further, that the definite location of the grant was fixed by some act performed, to which the approval of the Secretary of the Interior relates, and performed at a time prior to the initiation of Van Dyke's homestead rights.

The railroad Company's profile map was filed in the local land office on December 30th, 1909, and approved by the Secretary of the Interior, March 4th, 1911, hence the approval of the map gives effect to the grant as of the 30th day of December, 1909, as divesting on that date the title of the United States. The defendant Van Dyke settled the land and applied for homestead entry December 22nd, 1909, and his patent issued on February 12th, 1912, and served to divest title of the United States by relation on the 22nd day of December, 1909. Therefore the Van Dyke title is superior to the railroad's title to the land in controversy in so far as affected by the rule of priority in acquisition of right as against the United States.

The question here, is, Whether the actual construction of the road over the premises constituting the patented homestead is such an act in the circumstances shown in this case, as would deny to the appellants such priority of right, as against the railroad company,
237 and give the railroad company a right to be preferred over such intervener as to the lands in controversy. In other words, Whether the actual construction of the railroad in the circumstances in evidence is such act of definite location, of the said 2.23 acres of land, as the patent when issued will relate back to as initiating a right to be preferred and cut off the right of the homesteader initiated later. The answer depends upon the public character of the land involved, and the nature of the right acquired.

The railroad was actually constructed across the homestead premises in August and September 1909. The premises were then and prior thereto had been and thereafter were for a time held by the Miami Land and Improvement Company under regular mineral location, and said Miami Land and Improvement Company conveyed other lands to the railroad company as a right of way over and across said premises and to the extent of fifty feet in width on each side of the center of its surveyed line. Said deed of conveyance was dated September 27th 1909, and the road was actually constructed upon the right of way described in the deed. Possession of the lands described in the deed was delivered to the railroad

npany and by it such lands and no other were actually appro-
priated to its right of way purposes. No greater amount
8 of land was used or ever has been used by the railroad com-
pany for right of way or for any purpose other than the said
ip one hundred feet in width and of a length across the mining
ations with the railroad along the center line. No adverse right
or could be asserted to such strip of land actually so appropriated
against the railroad company. The railroad having been actually
nstructed along the center of the strip and in operation was un-
stakable evidence and notice of appropriation of the lands so
ually used and appropriated for the said purpose. As to such
nds so in the possession of the railroad company, the said com-
ny was prior in right because prior in actual appropriation, and
e approval of the map of definite location relates back to such
tual construction of the road definitely fixing the grant as of the
te of said construction of the road to the extent of lands actually
propriated to that purpose, namely, a strip of land extending in
length across the mining locations, and fifty feet in width upon
ch side of the center of such track. Jamestown & N. R. Co. v.
nes, 177 U. S. 125, 44 L. Ed. 698. Such lands are not the sub-
t of this action.

The purpose of the suit is to widen the right of way from
9 one hundred feet, as fixed by the deed of September 27th
1909 and confirmed by the approval of the profile map, to a
dth of two hundred feet, the railroad company asserting its right
claim the additional width of right of way as also acquired by the
ant of the Act of March 3rd 1875 and approval by the Secretary
the Interior. The appellants seem to concede that the right of
y as it existed in extent of one hundred feet in width at the time
e railroad was actually constructed, passed beyond their right to
aim under the homestead entry. If not fully conceded the au-
ority of Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L.
d., 698, supra, is conclusive of any other claim, because title of
e railroad company to such right of way became fixed and com-
eted by the approval of the profile map under the grant. The
ght of the railroad company to be preferred as to its claim to such
rip of ground so actually appropriated by it as against rights sub-
quently initiated cannot be doubted on authority or reason.
ctual possession and use of the said strip of land for a right of way
actual appropriation of such lands and the construction of the
ilroad thereon is a fixing definitely of the line upon that ground,
ecause as stated in the Jamestown & N. R. Co. v. Jones case, the
tual construction of the road is certainly unmistakable evidence
of and notice of appropriation.

40 In Dakota C. R. Co. v. Downey, 8 Land Dec. 115, Secre-
tary Vilas said:

"As to the roadway the construction of the road fixes the bound-
ries of the grant, and fixes it by the exact rule of the statute. * * *
his must undoubtedly be the rule when the road is constructed

over unsurveyed lands, because then every condition necessary to the vigor of the present grant is complied with."

Such language is used, of course, with reference to unappropriated public lands to which no prior possessory right has attached. It does not mean that if land of sufficient width on each side of the central line of the constructed road is not public lands subject to the satisfaction of the grant free from conflicting claims that the railroad company may take from a private claimant or other than the United States lands sufficient to meet the exact rule of the statute, and give such land to the railroad company in order to measure the right of way by the statute.

In Washington & Idaho R. R. Co. v. Osborn, 160 U. S. 103, 40 L. Ed. 356, the Court said:

"It would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers. Accordingly, when we examine the act of March 3, 1875, upon which the plaintiff rests its claim of right to appropriate to its use, without compensation, the land and improvements of Osborn, we find in the 3d section an express provision saving the rights of settlers in possession."

241 In this case the Miami Land and Improvement Company was in possession by Cleve W. Van Dyke of the additional strips of land here in controversy at the time the railroad was actually constructed upon the one hundred foot strip conveyed and appropriated to right of way purposes, by possessory claim founded upon a regular mineral location. Such right of possession was of such nature as would require the railroad company to respect and condemn before it could appropriate the land and use it for right of way. This record presents no action taken of that nature having for its purpose such result. The railroad company has never had actual possession of such additional strips of land at any time for any purpose. Therefore, Jamestown & N. R. Co. v. Jones, supra, is not authority for holding that the actual construction of the railroad is certainly evidence and notice of appropriation of such additional strips of land to right of way purposes for the reason no appropriation was in fact made, and one condition, i. e., possession to give vigor to the grant, was absent. 8 Land Dec. 115.

The actual construction of the road appropriating a purchased right of way to its use, would give the railroad company no just right to be preferred in its claim of additional ground for

242 right of way purposes, as against a homestead settler who initiated his homestead claim before the railroad company commenced any regular proceedings to claim the right to such additional strips as one of the benefits of the grant offered by the act of 1875.

The rule of Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424, is stated as follows:

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the ac-

quisition of the title have been complied with, parties may, as gainst each other, acquire a right to be preferred in the purchase r other acquisition of the land, when the United States have deter-nined to sell or donate the property. In all such cases, the first n time in the commencement of proceedings for the acquisition of he title, when the same are regularly followed up, is deemed to be he first in right."

Can one consistently and truthfully say in the circumstances hown on this record that the railroad company was first in time n the commencement of proceedings for the acquisition of the itle to the additional strips of land, when the facts are that it never equired possession of the said strips of land; never claimed the right o possession, and took no steps at any time to recover the possession by condemnation or otherwise until the 30th day of December, 1909, and later when this action was commenced: that it
243 purchased the possessory right of the mineral claimant to a right of way lying between the two strips of land, and constructed its railroad on the said purchased strip of land, and first ommenced proceedings to acquire title to said tracts or strips of dditional ground after the mineral locator's rights had lapsed and he homestead settler's rights had been initiated, by filing a profile nap of its located railroad, and thereby for the first time claimed as part of its right of way the two strips of land here in controversy?

I think not. The claim of the railroad company of the benefits of the grant is one of the essential conditions precedent to its right of grant. Larsen v. Oregon Nav. & Ry. Co., 19 Or. 240, 23 Pac. 974; Spokane Falls Etc. R. Co. v. Ziegler, 61 Fed. 392, 167 U. S. 65, 42 L. ed. 79; Hall v. Russell, 101 U. S. 509, 25 L. ed. 829; D. & R. G. R. Co. v. Wilson, 28 Colo. 6, 62 Pac. 843; Railroad Co. v. Jones, 7 N. D. 619, 76 N. W. 227; Enoch v. Spokane Falls & N. Ry. Co., 6 Wash. 393, 33 Pac. 966; Railroad Co. v. Sture, 32 Minn. 95, 20 N. W. 229, and the language of Section 4 of the Act of 1875 support the answer.

The acts of surveying and staking out a right of way according to the survey are held in Stalker v. Oregon S. L. R. Co., 225 U. S. 143, 56 L. ed. 1027, 1031, insufficient to initiate a right to claim under the grant, because, being the acts of the company alone
244 they are changeable at its will, and may not be considered as fixing the location of the road.

The railroad company cites Bonner v. R. G. So. R. Co., 31 Colo. 446, 72 Pac. 1065, in support of its prior rights. The Bonner case discloses that the railroad company claimed the benefits of the grant by filing its profile map which was approved before the adverse mineral claimant's location was commenced, hence, a very different state of facts from those disclosed by this record.

The lands in controversy were included within the boundaries of a forest reserve and therefore withdrawn from sale or donation at the time the railroad was surveyed and constructed over the mining locations and plaintiff was granted permission to construct its road within the forest reserve. Plaintiff urges this fact as of

advantage to it and contends that it had twelve months after the lands were withdrawn from the forest reserve in which to file its map of definite location. An answer to this contention is that the regular mineral locations within the boundaries of the forest reserve are no part of the reserve, and if it had acquired the possessory title of the locators to the additional strips of land as it acquired to the strip one hundred feet in width, no question could now be raised denying its priority of right after the lands
245 reverted to the United States and the United States offered to sell and donate the lands under the land laws of Congress.

Not having acquired the possessory right, and not having the actual possession of the additional strips of land, when the lands were offered for entry or donation, such strips of land were properly included in the offer of sale or donation and subject to appropriation under the laws of Congress by the first claimant. Van Dyke was that claimant, and thereby acquired the right to be preferred because of his diligence, and having acquired the absolute legal title through patent from the United States free from the burden of the right of way easement, the title thus acquired is prior and superior to that acquired by plaintiff and as a consequence plaintiff has not shown a right to recover on the strength of his own title, but the matter of strength of title as the matter of preference right to the 2.23 acres of land is with the Van Dyke title, and therefore with appellants. For this reason the conclusions of law are not sustained by the facts found. The facts compel an opposite conclusion of law, viz: that plaintiff recover nothing and that the title to said described lands be quieted in appellants, and that they recover costs.

246 For these reasons I am of the opinion that the judgment and decree ought to be vacated and the cause remanded to the lower court with instructions to enter judgment on the facts found for appellants with costs.

D. L. CUNNINGHAM, *Judge.*

Filed June 2, 1916. C. F. Leonard, Clerk.

And on, towit: the 2nd day of June, 1916, being one of the regular judicial days of said Supreme Court, the following Order and Judgment, inter alia, was had and entered of record in said Cause, in words and figures, towit:

(Title of Cause.)

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered, That the judgment of the lower court in this cause be and the same is hereby affirmed.

It is further ordered, adjudged and decreed, That the Arizona Eastern Railroad Company, a corporation, appellee herein,
247 do have and recover of and from Cleve W. Van Dyke and Ida A. Van Dyke, his wife, and Patrick H. McGuire, ap-

pellants herein, and Clara A. Englund and L. D. Van Dyke, sureties on supersedeas and appeal bond herein, its costs in this Court taxed at Thirty-five ($35.00) Dollars, together with its costs in the lower court in this cause incurred.

(Title of Court and Cause.)

Motion for Rehearing.

Come now the above named appellants by their attorneys and move the Court to grant a rehearing in the above entitled cause and for the following reasons:

I.

It appears from the opinion and decision of this Honorable Court that it misconstrued the position of appellants as to the question whether the appellee having filed and having had approved by the Secretary of the Interior a definite line of location of its railroad could construct its road over and along another route over public lands and acquire a title to the latter without first relinquish-
248 ing its title to the original location. The particular language used by the Court is as follows: "It is conceded as we understand it by the appellants that if the land through which the appellee constructed its right of way had been at the time public lands of the United States, the appellee was not bound to follow the lines as shown by its map and profile, but was at liberty to construct its railroad upon any other of the public lands along the general course of the original survey."

The appellants urge that the Court is in error in assuming that the position of the appellants was as stated and that the concession as thus assumed was correct as a matter of law.

In appellee's reply brief on page- 7 and 8, this matter was discussed and reference made to the case of Jamestown & N. R. Co. vs. Jones, 177 U. S. 125, and also to the circular of the General Land Office issued May 21, 1909, as sustaining the proposition that the railroad company could not by construction, without the relinquishment of its prior location, obtain title to a second right of way, but that if it should proceed to construct upon a right of way other than that described in its map without relinquishment, its title to such second location takes effect only from the date
249 a map of amended location showing the latter is approved.

It seems to us that this Honorable Court has overlooked the argument of appellee as made in their reply brief and that in this misapprehending appellee's position, has failed to give effect to what we contend is the law upon the subject, and that had the Court given effect to the law as we conceive it, a different conclusion would have been reached as to the time when the rights of Van Dyke attached to the land in controversy.

II.

We respectfully invite the Court's attention to the proposition discussed by it relating to the effect of the approval of the map of September 21, 1909 as a permit to enter upon the Crook National Forest Reserve and to construct the road thereon. We suggest that the Court is in error in infer-ing that it was the practice of the Secretary of the Interior to grant such permission by the mere approval of a map of definite location. This is evinced as we suggest from the fact that there appears in the record an application for such permit by the railroad company which application, however, does not seem to have been finally acted upon. Furthermore the Court does not seem in this connection to have considered the law of March 3, 1909, as construed in the case of C. M. & St.
250 P. R. R. Co. vs. U. S., 218 Fed. 288, which case in our judgment clearly decides that only specific rights of way may be granted under the law of 1899.

III.

We also beg to suggest that the Court has not given due consideration to the facts pointed out by Mr. Justice Cunningham in his dissenting opinion that the railroad company at no time prior to the 30th day of December, 1909, was in the actual possession of the strips of land in controversy, took no steps to recover the possession of the same, but purchased a possessory right from mineral claims of the land and constructed its road in accordance with said purchased right of way, which excluded the strips of land in controversy; and that its first act evincing a purpose and intent of acquiring title to said strips of land through the extension of its right of way from 100 ft. in width to 200 ft. in width, was in filing of its amended map of location on December 30, 1909, after the rights of Van Dyke had indubitably attached thereto.

Finally we again suggest that the Court has erred in failing to give effect to the act of March 3, 1875, which requires of any railroad company seeking to acquire a right of way under it to show that under its charter it possessed the power and authority
251 to build its road over the proposed route, for the reason that there was an adjudication of this question by the Secretary of the Interior which concludes the appellee from raising that question in this proceeding, and respectfully ask that it reconsider this question particularly with respect to its bearing on the proposition that title to the additional right of way vested by operation of law in the railroad company upon the opening of the land to settlement on December 22, 1909.

RICHARD E. SLOAN,
F. C. JACOBS,
Attorneys for Appellants.

Filed June 17, 1916. F. C. Leonard, Clerk.

And on, towit: the first day of July, 1916, being one of the regular judicial days of said Supreme Court, the following order,

nter alia, was had and entered of record in said cause in words nd figures, towit:

(Title of Cause.)

It is ordered, at this date, that the Motion for Rehearing filed erein, be and the same is hereby denied.

252 (Title of Court and Cause.)

Petition for Writ of Error.

To the Honorable Henry D. Ross, Chief Justice of the Supreme Court of the State of Arizona:

Clev W. Van Dyke, Ida A. Van Dyke, his wife, and Patrick H. McGuire, the appellants in the above entitled cause, respectfully show by this petition that in the records, proceedings and decisions in the Supreme Court of the State of Arizona, the same being the highest court of said State in which a decision could be had in this suit, in the above entitled cause, a manifest error has occurred greatly to the damage of said appellants.

That as appears in the said records and proceedings, there was drawn in question the title to certain lands described in the complaint in said cause, and which title constituted the subject matter of said suit. The title to said lands was claimed in the suit by the appellants to be vested in them under and by virtue of the public land laws of the United States and particularly under and by virtue of a patent of the United States issued to them under the homestead laws of the United States, and the decision of said Supreme Court
253 was against the title of appellants so claimed and asserted and in favor of a title claimed and asserted by the appellee under and by virtue of the Act of Congress of March 3, 1875; all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore, petitioners pray that a writ of error be allowed and that a transcript of the records, proceedings and papers upon which said decree was entered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said Court in such cases made and provided, to the end that the same may be by the said Honorable Supreme Court inspected and corrected in accordance with law and justice.

RICHARD E. SLOAN,
Attorney for Petitioners in Error.

Filed: July 28, 1916. C. F. Leonard, Clerk.

(Title of Court and Cause.)

254 *Assignment of Errors.*

To the Honorable Henry D. Ross, Chief Justice of the Supreme Court of the State of Arizona:

Now come Cleve W. Van Dyke, Ida A. Van Dyke, and Patrick H. McGuire, plaintiffs in error in the above entitled cause and in con-

nection with their petition for a writ of error file the following a
signment of errors upon which they rely to reverse the judgmer
of this Honorable Court entered on the 2d day of June, 1916.

I.

That the Supreme Court of Arizona erred in affirming the judg
ment of the trial court and in failing to reverse the same because
manifest errors committed by said trial court preserved in the recor
of said appeal, properly assigned as errors and presented to sai
court in briefs of counsel and which said errors were as follows:

1. It appears from the record of said cause that the trial cou
erred in finding that the appellee, the Arizona Eastern Railroad Com
pany, at the time of the construction of its so called Globe and Mian
Extension, had the right, power and authority under its cha
255 ter to construct said line of railroad from the city of Glob
to the town of Miami and over the premises in controvers
and to acquire a right of way across the public domain under th
Act of Congress of March 3, 1875, it appearing from the undispute
evidence in the case that neither said road nor its predecessor i
interest, The Gila Valley, Globe & Northern Railroad Company, ha
any such right, power and authority under and by virtue of the
Articles of Incorporation to build said extension at the time of sai
construction and there was not shown any determination by the Se
retary of the Interior to the contrary that concluded the trial cou
as a matter of law from so finding.

2. Because the trial court erred in finding as a fact that the Gil
Valley, Globe & Northern Railroad Company, the predecessor i
interest of the Arizona Eastern Railroad Company, obtained writte
permission and authority from the Forest Service to go into, ov
and beyond the Crook National Forest Reserve and to locate an
construct its said railroad therein and thereon, for the reason tha
the evidence does not sustain said findings but is contrary thereto.

3. Because the trial court erred in its conclusion of law on the fac
found that the appellee, The Arizona Eastern Railroad Company
is the owner in fee and entitled to the possession of all th
256 premises described in plaintiff's complaint and that the ap
pellants and none of them have any right, title or interest i
and to the same or any part thereof, for the reason that said co
clusion of law is not supported by the findings of fact made by th
court, in that said findings of fact do not show that the Gila Valley
Globe & Northern Railroad Company, the predecessor in interest
the appellee, acquired a right of way over the lands in dispute und
the Act of Congress of March 3, 1875; and because further it appea
by said findings that at the time said road was constructed the sai
land was held under valid mining locations by the Miami Land
Improvement Company; that the said railroad company at the tim
of said construction acquired by deed from said mining company
right of way through said mining claims to the extent of 50 fe
upon either side of the central line of its road as so constructed, an

that the right of way so held and upon which said road was constructed by the said railroad company did not include the land in controversy or any part thereof; that furthermore it appears from said findings that the appellant, Cleve W. Van Dyke, having theretofore purchased the said mining locations and received a deed to the same and having theretofore made settlement upon the same
257 and being in the possession of the same made homestead entry upon said land on the 22d day of December, 1909, and thereafter remained in the actual possession of said land and obtained a United States Patent therefor under said entry; and that furthermore no map of any right of way over, upon or across said lands in controversy was ever filed by said railroad company in the United States Land Office until after said filing of said homestead entry.

4. Because the trial court erred in its judgment quieting appellee's title to the land in controversy for the reason that said judgment is not sustained by, but is contrary to the evidence in the case in the following respects:

a. The undisputed evidence is that the Gila Valley, Globe & Northern Railroad Company, the predecessor in interest of appellee, was not authorized or empowered by its Articles of Incorporation to construct a line of road from Globe to Miami and was not authorized or empowered to build a line of railroad over and across the land in controversy. It being conclusively established that said railroad company was authorized by its charter to build a line of railroad from Bowie Station in Cochise County, Arizona, to the town of Globe, and a branch line starting on said line of railroad at or near San Carlos Station to run southeasterly to a point on the
258 San Pedro River and was not authorized to build and construct any other road or branch line of road whatsoever, and that, therefore, it could not and did not acquire a right of way for said line from Globe and Miami across the public domain of the United States under the Act of Congress of March 3, 1875, or any other law of the United States.

b. It conclusively appears from the evidence that at the time of the construction of the road from Globe to Miami by the Gila Valley, Globe & Northern Railroad Company, the land in controversy was included within and formed part of the Crook National Forest Reserve, and therefore, no right was or could be acquired by said railroad company by virtue of said construction under the Act of Congress of March 3, 1875, and it does not appear that said railroad company acquired any right by virtue of said construction under any law of the United States.

c. It appears from the evidence that the land in controversy is a part of the tract patented to Cleve W. Van Dyke by the United States under his homestead entry made on the 22d day of December, 1909, immediately upon the opening of said land for entry after its segregation from said forest reserve under and by virtue of the executive order of the President of the United States made on the 22d
259 day of August, 1909, which in effect provided that said land should not be subject to homestead or other filing under the land laws of the United States prior to said 22d day of December,

1909, and which forbade the acquisition of any right thereto prior to said date; that the said railroad company constructed its road within the boundaries of said land so patented to said Cleve W. Van Dyke in September and October, 1909, and over and along a right of way conveyed to it by the Miami Land & Improvement Company which consisted of a strip of land approximately 100 feet in width, being 50 feet on each side of the central line of the road as so constructed; that said Miami Land & Improvement Company at the time of said deed was holding the land so held under and by virtue of certain mining locations; that the said railroad company entered into possession of said strip of land so held by said mining company under said deed and has held the same ever since as its right of way but did not go into possession of the strips of land, title to which is sought to be quieted in this action, but the latter has ever since said settlement thereon been in the possession of said Van Dyke; that prior to the construction of said road Van Dyke had made an application for the listing and segregation of said land from the forest reserve and had settled upon the same and at the time of said construction of said road and prior to his application for said
260 listing and segregation Van Dyke had acquired an option to purchase the said mining claims from said mining company, and that at the time of his said homestead entry thereon he held the legal title to the said mining claims and that prior to December 30th, 1909, the railroad company made no claim to any right of way across the land in controversy under the Act of March 3, 1875, and filed no map of definite location of said right of way prior to December 30, 1909.

5. Because the trial court erred in rendering judgment for appellee quieting its title to the land in controversy because said judgment was contrary to and unsupported by the evidence in this, that it is shown that Van Dyke acquired rights to the land in controversy before any right thereon was acquired by the Gila Valley, Globe & Northern Railroad Company and that, therefore, if any right of way has been acquired thereon by said railroad company it is subject to and subordinate to said rights of Van Dyke.

II.

That the Supreme Court erred in deciding that appellee's rights to the land in controversy were acquired prior to the 30th day of December, 1909, when it filed its amended map and profile with the local land office, and in affirming the judgment of the trial
261 court upon such decision for the reasons,—

1. That the undisputed evidence shows that the Gila Valley, Globe & Northern Railroad Company could not claim or acquire a right of way under the Act of March 3, 1875, across the land in controversy, because it had no right, authority or power to construct a road from Globe to Miami under its Articles of Incorporation, and that if it appears that there was any determination to the contrary by the Secretary of the Interior prior to December 30, 1909, such determination was based upon an erroneous construction of said

Articles of Incorporation or upon a misapprehension of the requirements of the law of March 3, 1875, and hence said determination is not binding upon the appellants.

2. Because at the time of the construction of the road across the land included within the homestead entry of Van Dyke, the said land was covered by existing mining locations and the Act of March 3, 1875, did not, therefore, apply to the same.

3. Because at the time of said construction the railroad company could not acquire a right of way under any law of the United States across the lands in controversy for the reason that the record shows that it had obtained the approval of the Secretary of the Interior to another right of way from Globe to Miami over and across
262 other lands than those in controversy, which said right of way was not relinquished until the 30th day of December, 1909.

4. Because it does not appear that the railroad company in building its road across the land included in the homestead entry of Van Dyke made any claim or intended to assert any claim to a right of way across the same under the law of March 3, 1875.

5. Because the railroad company went into possession of the land upon which the actual construction of the road was made under and by virtue of a deed from the Miami Land & Improvement Company, and its actual appropriation and use of said land was restricted to the land described in said deed, which excluded the tracts of land in dispute, the title to which was sought to be quieted.

6. Because the railroad company was not in the possession of the land in controversy and was asserting no right to the possession of the same when the lands were opened for homestead entry, to-wit, on December 22, 1909, and at the time when Van Dyke made his homestead entry.

III.

That the Supreme Court of Arizona erred in affirming the judgment of the trial court and in not reversing the same for the
263 reason that it conclusively appears from the record that on December 22, 1909, the date when appellant Van Dyke made his homestead entry, the Gila Valley, Globe & Northern Railroad Company, predecessor in interest of the appellee, was not a qualified grantee under the law of March 3, 1875, in that it was not authorized or empowered under its Articles of Incorporation to build its line of railroad from Globe to Miami and there was no determination of that question by the Land Department that concluded the Court from so finding.

IV.

That the Supreme Court of Arizona erred in affirming the judgment of the trial court and in not reversing the same for the reason that the record shows that at the time the land in controversy was opened to settlement and filing on December 22, 1909, the railroad company was not in possession of the same and was not claiming the

same under the law of March 3, 1875, or under any other law of the United States permitting the acquisition of rights of way across the public domain, but had theretofore constructed its road over a right of way purchased from the Miami Land & Improvement Company which held the same by virtue of mining locations made under the mineral laws of the United States which said right of way excluded the land in controversy, and was claiming title to the same solely by reason of said deed, and it further appears from the record
264 that no map of said right of way so purchased or of any right of way across the land included in the Van Dyke patent had on said 22d day of December, 1909, been filed in the land office.

V.

That the Supreme Court of Arizona erred in affirming the judgment of the trial court and in not reversing the same for the reason that it conclusively appears from the record that if the railroad company on the 22d day of December, 1909, was a qualified grantee under the Act of March 3, 1875, it did not acquire the land in controversy as a part of its right of way for the reason that when the land in controversy was filed upon by Van Dyke under his homestead entry, it had already acquired title to another right of way for the same railroad over another and different route than that across the lands in controversy, which said other right of way was not relinquished until December 30, 1909.

VI.

That the Supreme Court of Arizona erred in its decision that the appellants in the said Supreme Court had no interest in the land under the claim of right now asserted that enabled them to raise the question whether or not the Gila Valley, Globe & Northern Railroad Company was on December 22, 1909, a qualified grantee
265 under the law of March 3, 1875; it appearing by the record that Cleve W. Van Dyke made his homestead entry before the approval by the Secretary of the Interior of any map of definite location of any right of way across said homestead entry or any right of way that effected the land in controversy, and it appearing further that at the time of the approval of the map of the right of way embracing the land in controversy, Van Dyke had an interest therein which was effected thereby.

VII.

That the Supreme Court of Arizona erred in deciding and in basing its affirmance of the judgment of the trial court upon the ground that the rights of appellants to the land in controversy were subsequent in time to those of appellee because prior to the homestead entry of Van Dyke appellee had constructed its road across the same and had acquired a right of way therefor under the law of March 3, 1875, for the reasons,—

1. That it appears that at the time of said homestead entry and
ior thereto the appellee was not a qualified grantee under the law
March 3, 1875, it having no right, power or authority under its
arter to construct the road in question and there was no adjudica-
on by the Secretary of the Interior which precluded appellants
from raising that question in this suit.

56 2. For the reason that even if the railroad company was a
qualified grantee at the date of said homestead entry and
ior thereto it could not claim a right of way across the lands in
ntroversy under the said Act of Congress, because it was con-
usively shown that it had applied for and had had approved an-
her right of way for its said railroad which did not and could not
clude the land in controversy or any of the land patented to Van
yke and which said right of way was not relinquished by said
ilroad company until after said homestead entry was made by Van
yke.

3. And for the reason that the evidence is undisputed that the
ilroad company constructed its road across the lands described in
id homestead entry of Van Dyke under a deed of a right of way
00 feet in width purchased from the Miami Land & Improvement
mpany, and built its said road strictly in accordance with said
ght of way described in said deed, which excluded the land in con-
oversy, and that at no time prior to the homestead entry of Van
yke did the railroad company make any claim to the land in con-
oversy or enter into possession of the same or put up any stakes
monuments or do any act or thing indicating a purpose and in-
nt to claim an additional right of way or any right of way other
than that purchased as aforesaid from said mining company,
57 or that it was claiming any right of way across said land
included in the homestead entry of Van Dyke under the
w of March 3, 1875.

——— ———,
——— ———,
Attorneys for Plaintiffs in Error.

Filed: July 28, 1916. C. F. Leonard, Clerk.

58 (Title of Court and Cause.)

Order Allowing Writ of Error

On this 28th day of July, 1916, came on to be heard the applica-
on of Cleve W. Van Dyke, Ida A. Van Dyke, his wife, and Pat-
k H. McGuire, the plaintiffs in error in the above entitled cause,
their counsel, Richard E. Sloan, Esquire, for a writ of error; and
appearing from the petition filed herein and the record filed here-
th that the application ought to be granted, and that a tran-
ript of the record and proceedings and the papers upon which the
dgment of the court was rendered properly certified should be
nt to the Supreme Court of the United States, as prayed for in

said petition, and that such proceedings may be had as may be just in the premises.

It is, therefore, ordered that the writ of error be allowed upon the plaintiffs in error giving bond conditioned as the law directs in the sum of Twenty-five Hundred Dollars which said bond shall be a supersedeas bond, and when given shall stay all further proceedings in the cause; and that a true copy of the record,
269 assignment of errors, and of the proceedings had in the case in the Supreme Court of the State of Arizona be submitted to the Supreme Court of the United States properly certified as the law directs, to the end that the said court may inspect the same and do that which, according to law, should be done.

Dated at the City of Phoenix, this 28th day of July, 1916.

HENRY D. ROSS,

Chief Justice of the Supreme Court of the State of Arizona.

Endorsements: 1470. In the Supreme Court of the State of Arizona. Cleve W. Van Dkye, and Ida A. Van Dyke, his wife, and Patrick H. McGuire, Plaintiffs in Error, vs. Arizona Eastern Railroad Company, a corporation, Defendant in Error. Order Allowing Writ of Error. Filed Jul- 28, 1916. C. F. Leonard, Clerk Supreme Court.

(Title of Court and Cause.)

Bond.

Know all men by these presents: That we, Cleve W. Van Dyke and Ida A. Van Dyke, his wife, and Patrick H. McGuire, as
270 principals, and Wm. E. Brooks of Globe, and C. B. Loomis of Miami, of Gila County, Arizona, as sureties, are held and firmly bound unto the Arizona Eastern Railroad Company, a corporation, in the full and just sum of Twenty Five Hundred ($2,500.00) Dollars, to be paid to the said Arizona Eastern Railroad Company, a corporation, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 14th day of August, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a term of the Supreme Court of the State of Arizona, in a suit pending in said court between Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and Patrick H. McGuire, appellants, and the Arizona Eastern Railroad Company, a corporation, Appellee, a judgment was rendered against said appellants and the said appellants having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Arizona Eastern Railroad Company, a corporation, citing and admonishing it to be and appear at the Supreme Court of the
271 United States at Washington, within sixty days from the date thereof.

Now the condition of the above obligation is such that if the

said Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and Patrick H. McGuire, shall prosecute their writ of error to effect and answer damages and costs, if they shall fail to make their plea good, then this obligation to be void, else to remain in full force and virtue.

CLEVE W. VAN DYKE.
IDA A. VAN DYKE.
PATRICK H. McGUIRE.
WM. E. BROOKS.
C. B. LOOMIS.

UNITED STATES OF AMERICA,
State of Arizona, County of Gila, ss:

Wm. E. Brooks and C. B. Loomis, the sureties named in the above and foregoing bond being severally duly sworn, each for himself and not one for the other deposes and says that he is a citizen of the United States of America and a resident of the County of Gila, State of Arizona in the United States of America; that he is a freeholder and householder in said County of Gila, State of Arizona; that he is the owner in fee of real property situated in the County of Gila, State of Arizona, of the value of more than
272 $2,500.00, and that he is worth the said sum of $2,500.00 over and above all his debts and liabilities exclusive of property exempt from execution.

WM. E. BROOKS.
C. B. LOOMIS.

Subscribed and sworn to before me this 14th day of August, 1916. My commission expires March 16, 1920.

[SEAL.] E. S. DAVIS,
Notary Public in and for Gila County, State of Arizona.

The foregoing bond is approved this 30th day of August, 1916.

HENRY D. ROSS,
Chief Justice Supreme Court of Arizona.

Endorsements: No. 1470. The Supreme Court of the State of Arizona. Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and Patrick H. McGuire, Appellants, vs. Arizona Eastern Railroad Company, a corporation, Appellee. Bond. Filed Aug. 31, 1916. C. F. Leonard, Clerk Supreme Court.

273 (Title of Court and Cause.)

Precipe.

To the Clerk of the above entitled court:

Please incorporate into the transcript of error in the above entitled case the following:

The complaint; second amended answer and cross complaint; findings of fact and conclusions of law; the request of the defendants

for findings of fact; judgment; bill of exceptions together with all the exhibits; amended motion for new trial; notice of appeal; the opinion of the Supreme Court including dissenting opinion; the judgment of the Supreme Court; the motion for re-hearing and order denying motion for re-hearing; petition for writ of error; assignment of errors; order allowing the writ of error; the writ of error; the citation; the bond, and the certificate of the Clerk authenticating the record.

RICHARD E. SLOAN,
Attorney for Plaintiff in Error.

Endorsements: 1470. In the Supreme Court of the State of Arizona. Cleve W. Van Dyke and Ida A. Van Dyke, his wife, and Patrick H. McGuire, Plaintiffs in Error, vs. Arizona Eastern Railroad Company, a corporation. Defendant in Error. Precipe. Filed Sep. 8, 1916. C. F. Leonard, Clerk Supreme Court.

274 In the Supreme Court of the State of Arizona.

Clerk's Certificate.

SUPREME COURT,
State of Arizona, ss:

I, C. F. Leonard, Clerk of the Supreme Court of the State of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 273 inclusive, contain a full, true and complete transcript of the complaint; second answer and cross complaint; findings of fact and conclusions of law; the request of the defendants for findings of fact; judgment; bill of exceptions together with all the exhibits; amended motion for a new trial; notice of appeal; the opinion of the Supreme Court including dissenting opinion; the judgment of the Supreme Court; the motion for re-hearing and order denying motion for re-hearing; petition for writ of error; assignment of errors; order allowing writ of error; and the bond; in case No.
1470, Cleve W. Van Dyke, and Ida A. Van Dyke, his wife,
275 and Patrick H. McGuire, Appellants, vs. Arizona Eastern Railroad Company, a corporation, Appellee, as the same remain on file and of record in my office; being all that portion of the original record indicated by Appellants herein by their præcipe filed in said cause as necessary to a consideration of the question to be reviewed on writ of error to the Supreme Court of the United States.

And I further certify that the writ of error and citation attached hereto is the original writ of error and citation issued in said above entitled cause.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Supreme Court of the State of Arizona at Phœnix, this 20th day of September, 1916.

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk of the Supreme Court of the State of Arizona.

276 In the Supreme Court of the State of Arizona.

CLEVE W. VAN DYKE and IDA A. VAN DYKE, His Wife, and PATRICK H. McGUIRE, Plaintiffs in Error,

vs.

ARIZONA EASTERN RAILROAD COMPANY, a Corporation, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Arizona Eastern Railroad Company, a Corporation, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Arizona wherein Cleve W. Van Dyke, Ida A. Van Dyke, his wife, and Patrick H. McGuire, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry D. Ross, Chief Justice of the Supreme Court of the State of Arizona, this 30th day of August, in the year of our Lord one thousand nine hundred and sixteen.

HENRY D. ROSS,
Chief Justice of the Supreme Court of the State of Arizona.

277 Service of a copy of the within citation is hereby acknowledged this first day of September, 1916.

RAWLINS & LITTLE,
Attorney for Arizona Eastern Railroad Company, Defendant in Error.

[Endorsed:] 1470. The Supreme Court of the State of Arizona. Cleve W. Van Dyke, and Ida A. Van Dyke, his wife, and Patrick H. McQuire, Appellants, vs. Arizona Eastern Railroad Company, a corporation, Appellee. Citation. Filed Sep. 8, 1916. C. F. Leonard, Clerk, Supreme Court.

278 In the Supreme Court of the State of Arizona.

CLEVE W. VAN DYKE and IDA A. VAN DYKE, His Wife, and PATRICK H. MCGUIRE, Plaintiffs in Error,

vs.

ARIZONA EASTERN RAILROAD COMPANY, a Corporation, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Supreme Court of the State of Arizona, Greeting:

Because in the record and proceedings as also in the rendition of the judgment and decree which is in the said Supreme Court of the State of Arizona, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit, in the case of Cleve W. Van Dyke, Ida A. Van Dyke, his wife, and Patrick H. McGuire, appellants, vs. Arizona Eastern Railroad Company, a corporation, appellee, where was drawn in question therein the title to certain lands described in the complaint filed in said cause, and which title constituted the subject matter of said suit, and which said title was claimed by the Plaintiffs in Error under and by virtue of the Public Land Laws of the United States and particularly under and by virtue of a patent of the United States issued to them under the Homestead Laws of the United States, and the decision was against the validity of the title of the Plaintiffs in Error, so claimed and asserted and in favor of a title claimed and asserted by the Defendant in Error under and by virtue of the Act of Congress of March 3, 1875, granting rights of way across
279 the public domain of the United States to railroad companies complying with the provisions thereof, a manifest error has happened to the great damage of Cleve W. Van Dyke, Ida A. Van Dyke, and Patrick H. McGuire, Plaintiffs in Error herein as by their assignment of errors appears, we being willing that error, if any there be, should be duly corrected, and full justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, so that you have the same at Washington within sixty days from the date hereof in the said Supreme Court to be then and there heard, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, if any there be, what of right should be done according to the laws of the United States.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court this 1st day of September, A. D. 1916.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,
Clerk of the District Court of the United States for the District of Arizona.
By R. E. L. WEBB, *Deputy.*

Approved and allowed this September 1st, 1916.

HENRY D. ROSS,
Chief Justice, Supreme Court, State of Arizona.

280 [Endorsed:] No. 1470. In the Supreme Court of the State of Arizona. Cleve W. Van Dyke and Ida A. Van Dyke, his wife, and Patrick H. McGuire, Plaintiffs in Error, vs. Arizona Eastern Railroad Company, a corporation, Defendant in Error. Writ of Error. Filed Sept. 1, 1916. C. F. Leonard, Clerk, Supreme Court.

Endorsed on cover: File No. 25,584. Arizona Supreme Court. Term No. 754. Cleve W. Van Dyke, Ida A. Van Dyke, his wife, and Patrick H. McGuire, plaintiffs in error, vs. Arizona Eastern Railroad Company. Filed October 30th, 1916. File No. 25,584.

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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 59.

CLEVE W. VAN DYKE, IDA A. VAN DYKE,
His Wife, and PATRICK H. McGUIRE,
Plaintiffs in Error,

vs.

ARIZONA EASTERN RAILROAD COMPANY
Defendant in Error.

BRIEFS FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

RICHARD E. SLOAN,
F. C. JACOBS,
WILLIAM C. PRENTISS,
Attorneys for Plaintiffs in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 307

CLEVE W. VAN DYKE, IDA A. VAN DYKE, his wife, and PATRICK H. McGUIRE,
Plaintiffs in Error.

vs.

ARIZONA EASTERN RAILROAD COMPANY
Defendant in Error.

BRIEFS FOR PLAINTIFFS IN ERROR

STATEMENT OF CASE

The defendant in error, Arizona Eastern Railroad Company, brought this suit against the plaintiffs in error to quiet title to three strips of land, amounting in all to 2 23-100 acres, situate in the N. W. 1-4 of the S. E. 1-4 of Sec. 30, T. 1 N., R. 15 E., G. & S. R. B. & M., Gila County, Arizona, claiming ownership thereof in fee, which

it alleges its predecessor in title, the Gila Valley, Globe and Northern Railway Company, acquired under the Act of Congress of March 3, 1875 (18 Stat. 482,) the pertinent portions of which read, as follows:

> That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.
>
> * * * * *
>
> SEC. 3. That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and, where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act (to amend an act entitled an act) to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the

same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-four.

Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles, of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats of said office, and thereafter all such lands over which such right of way shall pass be disposed of subject to such right of way: PROVIDED, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

* * * * *

The allegation of Par. IV. of the complaint (R. p 3) is that, while the premises in question were "public lands of the United States," the said Gila Valley, Globe and Northern Railway Company, by constructing its railroad across said premises, acquired right of way under said act

to the extent of 100 feet on each side of the center line of its track.

Section 5 of the Act of 1875 provides that it shall not apply to any lands within the limits of any military, park, or Indian Reservation, or other lands especially reserved from sale.

The complaint did not allege that the land in question, at the time the railroad was constructed, was not within the limits of any military, park, or Indian Reservation, or that it was **not** reserved from sale. At the time the railroad was constructed and until December 22, 1909 Section 30 was specially reserved from sale.

Nor did the complaint allege that the Gila Valley, Globe and Northern Railway Company had charter authority to build the line in question. The allegation of the complaint in this respect is vague, uncertain and evasive. The evidence discloses that it did not have such authority.

The plaintiffs in error claim title to the strips of land in question under homestead patent issued by the United States to the appellant, Cleve W. Van Dyke, embracing all of the S. E. 1-4 of said Sec. 30 (Ex. G., R. p. 92.)

The plaintiffs in error conceded, however, that the defendant in error was entitled to right of way of specified and limited width, across said patented land, not by virtue of grant from the United States, but by virtue of grant by deed dated September 27, 1909, from the Miami Land and Improvement Company which theretofore claimed to be the owner of alleged mining locations covering the land in question and which had given the appellant, Cleve W. Van Dyke, an option thereon, and in the execution of which deed,

granting such right of way, the said Van Dyke acquiesced. (See Right of Way agreement R. p. 98.) Title to the land being acquired by Van Dyke under homestead entry and patent, such grant of right of way, though **per se** ineffective, is conceded to operate by estoppel against Van Dyke's title.

The railroad company, however, later undertook to claim right of way to the full width extent mentioned in the Act of 1875.

The character of the evidence, the findings of fact by the lower courts, and the power and duty of this Court to examine the evidence.

The case was tried by the trial court without a jury.

The evidence is presented in a bill of exceptions (R. p. 35) certified by the trial judge as containing all of the evidence (R. p. 52.) and consists of maps and documents and the testimony of only three witnesses: Jones, a civil engineer, for the Railroad Company; Van Dyke, for the defendants; and Forest Supervisor Swift, for the Railroad Company, in rebuttal.

There was no conflict of evidence or testimony except on one point, whether Swift had given Van Dyke a verbal special use permit, to which reference will be made later.

The trial court made findings of fact (R. p. 19,) covering only such points as it deemed material, some of which findings were flatly contrary to the evidence, as will be shown, and refused to make findings of fact requested by the defendants (R. p. 23 et seq.)

On appeal the majority of the Supreme Court of Arizona (Opinion R. pp. 105, 106) undertook to

"condense" the findings of fact made by the trial court "together with such other facts as we deem essential to a determination of the case," and further complicated the situation by lamentable misconception of the findings of the trial court and the evidence.

We appreciate that ordinarily findings of fact by the State courts are regarded as binding on this court, but here it is not a question of weight or sufficiency of evidence, but of competency, and legal effect of the evidence, in the main undisputed, as bearing upon the questions of federal law involved in the conflicting claims of the Railway Company and the homestead claimant under federal statutes (Dower & Richards, 151 U. S. 658; Barlow v. Northern P. R. Co., 240 U. S. 484, 489.)

It is, therefore, essential at the outset to make a clear statement of the facts and the evidence establishing them and point out the errors and misconceptions of the courts below; and we crave the indulgence of the court in doing this at greater length and with greater particularity than ordinarily would be necessary.

The essential facts, stated as nearly chronologically as practicable, are, as follows:

The Railroad Company was without charter authority to build a railroad between Globe and Miami.

The Gila Valley, Globe and Northern Railway Company, was incorporated in 1894, under the general railroad incorporation act of the Territory of Arizona, passed in 1887, and by its articles of incorporation (Ex. H. R. P. 94) was authorized to construct a railway from a point on the Southern Pacific at or near Bowie station, in Cochise County, through the counties of Cochise, Graham

and Gila, on the most practicable route to Globe, in Gila County.

On October 1, 1896, a copy of the articles of incorporation and proofs of organization were filed with the Secretary of the Interior (Complaint, Par. II., R. p. 2.)

By amendment to the articles of incorporation in 1905 (Ex. H. R. p 96) said company was authorized to construct a branch line commencing at a point on its main line at or near San Carlos, and running thence in a southwesterly direction to a point at or near the mouth of the San Pedro River in Pinal County, and a second branch line commencing at some convenient point on the above-mentioned branch line east of Dripping Springs Wash and crossing the Gila River to some convenient point on the Arizona Eastern Railroad.

It appears by certificate of the Arizona Corporation Commission, (R. p. 98) that no other amendment of the charter of the Railway Company was made thereafter, and consequently that it had no charter authority or franchise to construct a line from Globe to Miami.

The Arizona general railroad incorporation act of 1887 has remained unaffected by the subsequent revisions of the Territorial and State laws. It provided (paragraph 297, R. S. Ariz. 1887) that the Articles of Incorporation of any railroad company should, among other things, state "the place from and to which the proposed road is to be constructed and the counties into and through which it is intended to pass and its length as near as may be," and (Par. 298), that railroad companies organized under Articles containing the foregoing provisions, should be capable of acquiring real and personal property

necessary for the construction, completion and maintenance of "such railroad."

The Railway Company's Application for right of Way for Original Line Between Globe and Miami, not Traversing the land in Controversy.

Notwithstanding its obvious lack of charter authority, the Railway Company, during the month of March, 1906, surveyed a line of railroad from Globe to Miami, and on November 5, 1908, filed, in the United States Land Office at Phoenix, its map or profile showing the line so surveyed and evidencing that that line was adopted by its board of directors on October 20, 1908. (See copy of map in the Record opposite p. 78.) As will be seen, the line exhibited on that map traversed sections 15, 10, 9, 16, 21, 20, a small part of the extreme N. W. corner of 29, the N. E. 1-4 of 30, a small portion of the S. E. portion of the N. W. 1-4 of 30, and the S. W. 1-4 of 30, T. 1 N. R. 15 E., G. & S. R. B. & M. It did not traverse any part of the S. E. 1-4 of 30, in which the land in question lies.

In the affidavit of Epes Randolph attached to that map, it is falsely asserted that the Railway Company was authorized by its charter to build a railroad on that line.

The Land Was in a Forest Reserve and Not Subject to the Act of 1875 But to the Act of 1899.

In the meantime, however by proclamation of January 13, 1908, (35 Stat. 2176) sections 15, 10, 9, 16, 29 and 30, in said township, had been included in the Tonto National Forest. Thereafter, by proclamation of July 1, 1908, (35 Stat. 2194,) the Tonto National Forest, together with other lands, was incorporated into the Crook National

Forest. A copy of this proclamation appears in the Record at p. 81, with copy of the accompanying diagram opposite p. 82. It is to be noted, however, that upon this copy of the diagram has been indicated the area embraced in part of Sec. 29, all of Sec. 30, and adjacent lands, afterwards eliminated from the National Forest by Executive order of August 27, 1909 (R. p. 80-81.)

The majority of the court below (Opinion. R. p. 107) say:

"It is said, however, that **after** the approval of the map and profile and **before** the road was constructed the land in question, together with much other land in that community was thrown into the National Forest Reserve," etc.

This is another evidence of confusion of the facts which characterizes the majority opinion of the court below.

Before the Railway Company adopted the 1906 survey and filed its map of line of route on November 5, 1908, the greater portion of the sections traversed thereby, including Sec. 30, were reserved as part of a National Forest, and the lands embraced therein were not subject to the railroad right of way Act of 1875, but, with respect to the granting of railroad right of way across the same, were subject to the Act of March 3, 1899, (30 Stat. 1233,) which provided:

> "**That in the form provided by existing law** the Secretary of the Interior may **file and approve surveys and plats of any right of way** for a wagon road, **railroad,** or other highway **over and across any forest reservation** or reservoir site, **when in his judgment the public interests will not be injuriously affected thereby.**"

Van Dyke Went Into Possession Under An Option on Alleged Mining Claims.

It also appears that the land in question was embraced in alleged mining locations before referred to, claimed by the Miami Land and Improvement Company, and that in December, 1908, the appellant, Cleve W. Van Dyke secured an option thereon and pursuant thereto entered into possession, his purpose being, as he testified, to acquire all outstanding claims or titles to the land (R. p. 50.)

Departmental Action on the Railway Company's Original Application for Right of Way.

On April 16, 1909, the map of right of way which had been filed by the Railway Company was referred by the Commissioner of the General Land Office to the Forest Service, and on April 19, 1909, the same was referred to the District Forester, in order that he might make the necessary examination and require the applicant to execute such stipulation as might be deemed necessary for the protection of national forest interests (Ex. 4, R. p. 79), and on July 6, 1909, the Acting District Forester advised the Commissioner of the General Land Office that the applicant had executed the stipulation required to protect national forest interests and recommended that its application for a right of way be approved (Ex. 4, R. p. 80.) Thereafter on September 21, 1909, the Secretary of the Interior approved the map, subject to valid existing rights, evidently being misled by the false statemnet in Randolph's affidavit accompanying the map and overlooking the fact that the Railroad Company had no charter authority to build or operate a

railroad from Globe to Miami (Washington and Idaho R. Co. v. Coeur d'Alene R. Co. 160 U. S. 101.)

Although the evidence showed palpable absence of charter authority, the trial court found as fact (Finding 2, R. p. 20) that the Arizona Eastern Railroad Company (meaning the Gila Valley, Globe and Northern Railway Company) "at the time of the construction of the Globe-Miami extension had the right, power and authority to construct said line of railroad from the City of Globe to the town of Miami over the unappropriated public domain of the United States." **(Quaere,** was "unappropriated" intended to embrace "unreserved," inasmuch as part of the line was within and part without the National Forest?)

The majority of the court below (Opinion R., p. 111) recognized that the Railroad Company was without charter authority to build the Globe-Miami line, but, misconceiving the facts, as we will show, held that Van Dyke was without status to raise that question.

The Railway Company Had no Authority From the United States to Build a Railroad in the Forest Reserve Across the Land in Question.

After reciting the survey made in 1906 and the filing of map thereof on November 5, 1908, the trial court found (finding 3, R., p. 20.)

> "That thereafter on the nineteenth day of April, 1909, written permission to enter upon and construct said railroad in and upon said Forest Reserve was filed (sic) with the Department of Agriculture, Forest Service of the United States Government, and thereafter, on the sixth day of July, 1909, per-

mission and authority was obtained from the said Forest Service in writing permitting this plaintiff to go into, over and upon said Crook National Forest Reserve and to locate and to construct its said railroad therein and thereon."

And in the majority opinion of the court below (R. p. 106) it was stated as fact that on

"April 19, 1909, the Gila Valley, Globe and Northern Railway Company made application to the Commissioner of the General Land Office for permission to enter the Crook National Forest Reserve and on the 6th day of July was granted permission to go into, over and upon the National Reserve and to locate and to construct its said railroad thereon."

A careful examination of the evidence as presented in the bill of exceptions, certified by th trial judge as containing all of the evidence, fails to disclose any such application by the railroad company for a permit other than the filing of the map of line of route on November 5, 1908, which in effect was an application for permission to build a railroad **on that particular line**; and there is not in the record any written permit bearing date July 6, 1909, or any evidence that any such permit was applied for or granted.

The only paper bearing date April 19, 1909, appearing in the record or anywhere referred to therein, is the letter of the Commissioner of the General Land Office (Ex. 4, R. p. 79) referring to the Forest Service, for report and recommendation, the map filed November 5, 1908. And the only paper bearing date July 6, 1909, appearing in the Record or anywhere referred to therein, is the letter of the Forest Service to the Commis-

sioner, advising that the applicant had executed the stipulation required and recommending that its application for right of way be approved. (Ex. 4, R. p. 80.)

And that the Forest Service had no authority to issue any such permit is apparent from the last clause of Par. 2 of the Regulations of the Interior Department under the Act of March 3, 1899, **supra** (32 L. D. 481, 484,) which reads:

> "No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States **and has been approved by the Department,** or has been considered by this office or the Department, **and permission for such construction has been specifically given.**"

Under this regulation permission could be given only by the Commissioner of the General Land office or the Secretary of the Interior.

And this regulation was in force in 1908 and 1909 and is still in force. At the time the Forest Service was transferred to the Department of Agriculture an amendatory circular of April 25, 1906, was issued (not in the published land decisions) whereby Par. 2 of the regulations of Feb. 11, 1904, was amended to provide that whenever a right of way is located upon a forest or timber land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserve, but expressly declaring that the last clause of said Par. 2 (quoted **supra**), prohibiting construction in advance of approval or specific permission, should remain as theretofore. In the amended regulations of May 21, 1909, (37 L. D. 787, 789) control of the bond

and stipulation to be given by the applicant was again assumed by the Interior Department and the last clause of Par. 2 **(supra)** retained and amended to read as follows

> "No construction will be allowed in a national forest or a proposed national forest until an application for right of way has been regularly filed in accordance with the laws of the United States **and has been approved,** or has been considered by **this department, and permission for such construction has been specifically given."**

No permit pursuant to the said regulations was issued, or permission given, to the Railroad Company and, as noticed, the application for right of way, which it had pending, showed a line of road which did not traverse any part of the S. E. 1-4 of Sec. 30, embracing the land in question.

The majority of the court below (Opinion R. p. 109) says:)

> "We have been unable to discover any regulation requiring that the applicant for a right of way over a National forest should accompany it with a map and profile definitely fixing and placing the location of the right of way. The practice in the present case, of granting permission upon the original map and profile, is very strong and convincing proof that no such regulations existed at the time the permission was granted.

The majority of the court below thus failed to apprehend that right of way in a forest reserve cannot be acquired by construction but only by the approval of the Secretary of the Interior "in the form provided by existing law," of "surveys and plats" (Act of 1899, **Supra,)** that the precedent condition of filing a map is statutory,

and that the function of the Secretary is to determine if the construction of a railroad on the line definitely located by the survey and map will or will not injuriously affect the public interests, as well as to see that the qualifications of grantees prescribed by the Act of 1875 exist and that the conditions imposed by that act have been complied with.

Van Dyke's Status As a Homestead Applicant.

In the meantime, the appellant Cleve W. Van Dyke, having an option on and controlling the alleged mining locations, but having satisfied himself that the land was non-mineral, on May 13, 1909, applied at the local land office to enter the subdivision embracing the land in question as a homestead, but was informed that the land was in a Forest Reserve and was referred to the Forest Service. (Cleve W. Van Dyke testimony, R. p. 46.)

Thereupon, on June 5, 1909, Van Dyke made application to the Forest Service for examination and listing under the Act of June 11, 1906. (34 Stat. p. 233,) of 160 acres in Sec. 30, embracing the land in question, to the end that he might make homestead entry thereof. (Ex. B.. R. p. 83 et seq.)

The Act of June 11, 1906 appears in full in the record at p. 85. The pertinent portions thereof read as follows:

> "That the Secretary of Agriculture may in his discretion, and he is hereby authorized upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura,

Los Angeles, San Bernardino, Orange, Riverside, and San Diego; which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the list and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the the provsiions of the homestead laws and this act.

Upon the filing of any such lists or description, the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area, and not exceeding one mile in length at the expiration of sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated; Provided, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, **and the person, if qualified to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall,** each in the order named, **have a preference right of settlement and entry;** Provided further, That any entrymen desiring to obtain patent to any lands described by metes and bounds

entered by him under the provisions of this Act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of the notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like period; and further, that any agricultural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no land entered under the provisions of this Act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries."

* * * * *

"Sec. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this Act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve."

The regulations of the Department of Agriculture (Forest Service,) appearing in the record at p. 85, provided:

> "Sec. 2. Applicants will secure preference in the order of the receipt of their applications, unless the lands were occupied by bona fide settlers, prior to January 1, 1906, in which case the settlers have the preference.
>
> "Sec. 4. * * * * * * applicants entitled to a preference right under the act will be permitted to occupy the land applied for by them upon making application to the Forest Supervisor."

Being advised by the local forest supervisor that his application showed a conflict with other interests, and that if he would amend the application, he would be granted a permit to go on the ground and construct improvements, Van Dyke, on July 26, 1909, made an amended application for examination and listing, embracing 120 acres in Sec. 30, including the land in question. (See amended application, Ex. C., R. p. 88.)

By letter of August 2, 1909, Van Dyke was advised that the status of the tract covered by his application had been requested from the local land office (Ex. E., R. p. 89) and, by further communication he was informed that the local land office reported that the N. W. ¼ of the S. E. ¼ of Sec. 30 was covered by an outstanding homestead entry and that his application must be canceled to that extent, but that he might amend his application to include sufficient contiguous land to make 160 acres; and that, if he concluded not to amend and wished to begin cultivation and occupation at once, he should apply to Forest Supervisor Swift for a free special use permit for that purpose. (Ex. E., R. p. 88-89.)

It developed, however, that the homestead entry, reported by the local land office as outstanding, had been canceled upon relinquishment on November 20, 1908 (Ex. D., R. p. 91,) and under date of September 17, 1909, Van Dyke was advised that a report from the local office to that effect had been received by the Forest Service and that the Supervisor had been requested to have the tract applied for examined (Ex. H., R. p. 90.)

In the meantime, however, by Executive Order of August 27, 1909, Sec. 30 together with other lands, was directed to be eliminated from the Crook National Forest. (See Ex. 5, R. pp. 80-81.)

Thereafter, under date of November 2, 1909, Van Dyke was advised that, as the land covered by his application had been eliminated from the Forest by Executive Order of August 27, 1909, and was no longer under the jurisdiction of the Forest Service, his application for free special use permit was rejected, and he was referred to the Commissioner of the General Land Office for further information concerning the land. (Ex. O., R. p. 104.)

Van Dyke testified (R. p. 50) that after securing the option on the mining claims in December, 1908, he examined the ground and decided that the lands were non-mineral in character and determined to apply for the sub-division embracing the land in question as a homestead; that his amended application for examination and listing dated July 26, 1909 (Ex. C., R. p. 88,) was prepared by Forest Supervisor Swift, who then told him to go ahead with his improvements and that a written permit to occupy the land pending segregation and listing would follow (R. p. 46-50.)

Forest Supervisor Swift was called in rebuttal and denied that he had given Van Dyke a verbal special use permit to occupy the land, although he testified that he was acquainted with the land occupied by Van Dyke at Miami (R., p. 51.) On cross-examination, however, he testified that he had seen Van Dyke many times; that he had been out to Miami with him; that he had seen the land in controversy very frequently; that he might have seen Van Dyke a number of times during the summer of 1909 but could not remember the dates; that he remembered Van Dyke's having been in his office during the summer of 1909, but that he could not recollect the occasion upon which he amended an application for Van Dyke and did not recollect making any amended application for him and that he did not remember the conversation testified to by Van Dyke.

Van Dyke further testified (R. p. 47) that after the conversation with Swift he went on the ground with his wife on August 8, 1909, and selected the site for their home and on August 15, 1909, put up a tent and the same day gave the contract for the building of his house; that he completed the house and moved into it and had lived there ever since; and that the railroad company was not at work on that land at the time he started building.

The trial court did not make a direct finding resolving the conflict of testimony between Van Dyke and Forest Supervisor Swift as to the giving of verbal permission to occupy and commence improvements but, in effect, resolved it in Van Dyke's favor by finding. (Finding 10, R. p. 21:)

> "That at the time of making of said order of segregation, the said Cleve W. Van Dyke,

the defendant herein, was actually occupying the lands in controversy; that such actual occupancy by the said Cleve W. Van Dyke was made while the lands were yet within the said Crook National Forest and while the same were held and claimed as mineral claims by said Miami Land & Improvement Company. Such occupancy was with the knowledge of the Forest Supervisor of the Crook National Forest."

thus finding that, if not by express verbal permission of Supervisor Swift, Van Dyke's occupancy and building of his house were with the knowledge and acquiescence of Swift.

The Construction of the Railroad, Injunction, and Right of Way Agreement.

Jones, for the railroad, testified (p. 41) that the Railway Company's work upon the land in controversy was commenced in August, 1909, but he could not give the exact date, as his records show by the month and not by the exact date, and (R. pp. 38-40) that in September, after the grading had been practically finished, work was suspended by an injunction, and that the work of laying track was begun on the ground in controversy the first part of October, 1909 (after the execution of the right of way agreement,) and finished the day before they held a land sale out there in the early part of October —the 5th or possibly the 11th.

Jones further testified that the line was not constructed upon the survey made in March, 1906, and exhibited by the right of way map filed on November 5, 1908, (R. pp. 37-38,) but was constructed upon a line surveyed by him in November and December, 1908.

Restoration of the Land to Settlement and Entry and Van Dyke's Status (Continued.)

The executive order of August 27, 1909, directed that Sec. 30 embracing the land in question, be eliminated from the National Forest and restored to the public domain, and **become subject to settlement** under the general provisions of the homestead laws on such date and after such notice by publication as the Secretary of the Interior should prescribe, **but not to become subject to entry, filing, selection, or other form of appropriation until the expiration of 30 days from the date so fixed,** and that no person would be permitted to gain or exercise any right whatever, under **any settlement or occupation begun prior to such date.** (R. pp. 80-81.)

Van Dyke, however, at the date of the executive order, was in occupation of the portion of Sec. 30 embracing the land in question and engaged in constructing his house, under sanction of his pending application for listing and segregation, and with the knowledge of Supervisor Swift, if not by his express permission; so that the prohibition against the commencement of settlement or occupation prior to the date to be fixed by the Secretary of the Interior could have no application to Van Dyke, who was entitled to preference right under the Act of 1906, **(Supra.)**

Pursuant to said Executive Order, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, on September 4, 1909, issued and published notice that the public lands mentioned in said Executive Order would be restored to the public domain **on November 22, 1909,** and **become subject to settlement on and after that date, but not to entry, filing,** or selection **until on and after December**

22, 1909, with warning that no person would be permitted to gain or exercise any right whatever under any settlement or occupation **begun after September, 1909,** and **prior to November 22, 1909,** (R. pp. 91-92,) thus in effect sanctioning Van Dyke's occupation of the land in question.

From August 15, 1909, Van Dyke maintained residence upon the land in the tent referred to and in his house after the latter was completed, and was occupying his house before November 22nd.

Although he was not within the contemplation of the prohibition against commencing settlement or occupation after September and before November 22, 1909, yet, as a precautionary measure, on the night of November 21 he walked off the land and just after midnight made re-entry thereon.

In the bill of exceptions wherein, as certified by the trial judge, all of the evidence is presented, Van Dyke is reported as testifying that he made this re-entry after midnight on the morning of the 22nd of **December.** This is obvious error, but was taken seriously in the majority opinion of the Supreme Court of Arizona, which also fell into the misapprehension that by the executive order and notice of restoration the land did not become **open to settlement** until **December** 22, 1909 (R. pp. 106-107.)

That Van Dyke testified that he went off the land and went on it again after midnight on **November 22nd** is apparent from the notice of restoration, which fixed that day as the time when the land should be open to **settlement,** and from Van Dyke's testimony (R. p. 48) wherein it appears that he was shown a photographic copy of the affidavit accompanying his application to make homestead entry, which was filed on De-

cember 22, 1909, which affidavit, in accordance with the homestead law and regulations, included a declaration as to the date upon which the applicant initiated settlement upon the land, and that he was merely reiterating the allegation therein regarding the time of settlement.

As this affidavit is a public record in the General Land Office, we feel justified in filing herewith a certified photographic copy thereof and printing a copy of the same as an appendix hereto.

At the top of page 48 of the record it appears that Van Dyke testified that he was in possession of the land on November 22, 1909, and had been in possession ever since and was in possession prior thereto, and, at p. 42, that on and prior to the 22nd day of November, 1909, he was a settler on that land and was at that time in possession of it, and (R. p. 43) that the fence on the north side of the railroad track and the south side of his orchard was constructed prior to November 22, 1909, for the purpose of protecting his residence.

Another instance of obvious bungling of Van Dyke's testimony is found at page 50 of the record where he is reported as testifying that he put his tent on the land on the 15th day of **December,** when in fact he testified, as previously (R. p. 47,) that he put up the tent on August 15, 1909, and the same day gave the contract for building his house.

As stated, pursuant to the notice of restoration, the land became subject to **entry** at the local land office on December 22, 1909, and on that day Van Dyke filed homestead entry upon the S. E. ¼ of Sec. 30, alleging settlement November 22, 1909, and thereafter received patent (R. pp. 92-93.)

As already noticed, the trial court denied to Van Dyke status as a homestead settler prior to December 22, 1909.

On appeal, the majority of the court below (Opinion R. pp. 106-107,) as stated before, fell into the error of assuming that the land did not become open to **settlement** until December 22, 1909, and, following the trial court, assumed that Van Dyke, in legal contemplation, was theretofore occupying the same only under the option to purchase the mining locations, saying that Van Dyke attempted to show that he was there under a verbal permit from the Forest Supervisor and with the intention of entering the land under the homestead law and that he did actually make application to the Forestry Department for examination and listing under the Act of 1906, which application, however, was rejected, and

> "That he did not rely upon the settlement prior to **December** 22nd, 1909, is clearly shown by his own testimony. He said 'It is a fact that about midnight on the 22nd of December, 1909, I took up my residence in the house testified to. That is, I went off the ground and back on again at midnight." **December** 22nd was the first time this piece of land could have been **settled** upon without permission from the National Government, and this permission he did not obtain."

And, at page 110:

> "Appellant, Van Dyke, had an option upon it as a mining claim and subsequently bought it as such, but even before the appellee had constructed its road over it he had made application to the Land Department to have it examined and segregated from the forest reserve so that he might file a homestead thereon. The further fact that

it was subsequently homesteaded as agricultural land satisfies us that there was not at the time it was being held as mineral land any known mineral deposits thereon."

Thus, **while recognizing that the mineral locations were invalid and that Van Dyke had satisfied himself of that fact and was taking proper steps to secure the land as a homestead,** the court below, primarily due to its misconception that the land was not subject to homestead **settlement** until December 22nd, 1909, regarded Van Dyke's status as that of a mineral claimant of non-mineral land, and ignored his status as a preference right applicant under the act of 1906, and as a settler on the land before the railroad commenced construction work, whose rights were protected by the executive order and the notice issued pursuant thereto, and as a settler who was occupying his house on the land on November 22, 1909, and until he filed homestead application on December 22, 1909.

The majority of the court below also ignored the fact that Van Dyke's application for elimination and listing was rejected by the Forest Service, not for any cause inherent in the application or in the land, but because the Executive Order had taken the land out of the jurisdiction of the Forest Service. The Executive Order, in effect, amounted to the listing and segregation for homestead purposes for which Van Dyke was then applying.

On and after August 27, 1909, the date of the Executive Order, Van Dyke needed no permit or permission from the Forest Service.

The majority of the court below also failed to appreciate that Van Dyke was holding the option on the mining locations and finally pur-

chased the title thereto, merely to clear his title as a homesteader from the conflicting mineral claim.

In this respect Van Dyke was in a position analogous to that in which the majority of the court below attempted to put the railroad company (R. p. 110:)

> "The Railroad Company at the time that it surveyed and mapped its right of way over the land, staked and marked one hundred feet on each side of the center of the track. Thus, even while purchasing peace from the mineral claimant for a limited right of way, it was clearly and visibly claiming two hundred feet."

While purchasing peace from the mineral claimant by acquiring its title, Van Dyke was clearly and visibly claiming the land as a homestead.

The Railway Company's Amended Application For Right of Way.

On December 30, 1909, the Railway Company filed at the local land office a map of amended located line of the Miami extension, showing the line of railroad as constructed across the N. W. ¼ of S. E. ¼ of Sec. 30 (Ex. 3, R. opp, p. 79.)

It appears from the certificate attached to this map that the survey of the lines shown thereon was made between January 2, 1909 and June 22, 1909 (Affidavit of McClure), not, as Jones testified in November and December, 1908; and that the survey shown on the map was adopted by resolution of the Board of Directors of the Railway Company on **December 16, 1909,** as the definite location of its railroad (affidavit of Epes Randolph.)

Randolph's affidavit also again falsely asserted that the Railway Company, was authorized by its charter to build a railroad on said line. On March 4, 1911, this map of amended line was, by the Secretary of the Interior, approved subject to all valid existing rights, the lack of charter authority to build and operate a railroad from Globe to Miami being again overlooked.

The Railway Company Made No Claim to Right of Way in Excess of the Widths Specified In the Right of Way Agreement.

It thus appears that, after the railroad company had graded its line, it was stopped by injunction in September, 1909, and that work was not resumed until after the controversy was apparently settled by the Miami Land and Improvement Company's granting a right of way of specified and limited width (See right of way agreement, R. p. 98,) as the result of negotiations which Van Dyke testified (R. p. 44) had extended from December, 1908, until September 27, 1909.

And it was not until 1911, after the approval of its amended map, that the railroad company set up claim to right of way under the Act of 1875, extending in width beyond the widths specified in said right of way agreement (Van Dyke testimony, R. p. 44.)

As already noticed, in the majority opinion of the court below (R. p. 110) it was assumed that at the time the line, as constructed, was surveyed (November and December, 1908,) the Railway Company staked and marked 100 feet on each side of the center line. See also the statement to the same effect at page 106.

These assertions are flatly contrary to the evidence.

Jones, who made the survey, testified (R. p. 37) that he first surveyed where the line is now constructed upon the ground, in November and December, 1908, and (R. p. 39) that the survey of the center line, as shown on the map attached to the bill of complaint, is the first survey (meaning the survey made by him in November and December, 1908) and everything on the map refers to the center line as so surveyed; that the center line was laid down, but its station numbers, the beginning of its curves, etc., and everything was referred to the center line; that he knew of no survey having been made which marked out upon the ground other than the center line of the roadbed, and (R. p. 40) that at the time of the injunction the center line was staked, the slope stakes were in and the finishing grade stakes, to show the contractor how far to bring his cuts and fills, also such stakes as were necessary to show the beginning and ends of what culverts were opposite the little draws; in fact, all staking **necessary to construction.** Nowhere did Jones testify regarding any staking of any boundaries of claimed right of way. He left the employment of the company in June, 1910.

As noticed before, Van Dyke testified that no stakes were set by the Railway Company marking the boundaries of claimed right of way beyond the area fixed in the right of way agreement, **supra,** until the summer or early part of 1911, and that before that time there were no stakes or anything upon the ground to indicate that the Railway Company claimed more than 50 feet right of way (the width on each side of the center line for the greater portion of the distance through Van Dyke's homestead, mentioned in the right of way agreement;) and that they never claimed any more because the maps furnished

him by the Railway Company showed only 50 feet, except where the station grounds were and where the water tank was supposed to be.

The trial court found (Finding 4, R. p. 20,)

> "That thereafter plaintiff amended its said survey and changed the course of its said railroad to cross into, over and upon the lands described in plaintiff's complaint, and in the months of November and December, 1908, plaintiff marked and staked its said line of railroad and right of way on the ground along the entire length of said premises described in plaintiff's complaint filed herein, to extend one hundred feet on each side of said center line as provided for by said Act of Congress, and did, during the months of August and September, 1909, complete the construction of its said railroad over and across said premises as staked and marked on the ground and on the line of said amended survey."

The majority of the court below evidently regarded this as a finding that at the time of the survey in November and December, 1908, the Railway Company staked the exterior boundaries of right of way it intended to apply for; but the survey was not of the exterior boundaries of right of way, but only of the center line for the railroad, and the trial court obviously intended by such finding merely that the Railway Company so staked the center line, as testified by Jones.

BRIEF SUMMARY OF THE FACTS

Briefly summarized, the actual facts established by the uncontroverted evidence, are as follows:

1. The Railway Company was without charter authority to build a line from Globe to Miami.

2. Section 30 was included in the National Forest on January 13, 1908.

3. In December, 1908, Van Dyke acquired an option on alleged mining locations covering the land in question (in S. E. ¼ of Section 30) and went into possession.

4. Application for right of way for the line from Globe to Miami surveyed in 1906 (which did not touch the S. E. ¼ of Sec. 30) was filed on November 5, 1908.

5. In November and December, 1908, Jones surveyed the line through the S. E. ¼ of Sec. 30 on which the railroad was subsequently built.

6. The land was in fact non-mineral and Van Dyke, after investigation so demonstrated, tendered homestead application on May 13, 1909, which was rejected by the local land office because the land was in the National Forest.

7. Van Dyke thereupon, on June 5, 1909, made application to the Forest Service for examination and listing under the Act of June 11, 1906, and amended application, July 26, 1909, which included request for special use permit.

8. On August 15, 1906, Van Dyke put a tent on the land and commenced building a dwelling house thereon and thereafter occupied the same as a homestead claimant, with the knowledge, if not express permission, of Forest Supervisor Swift.

9. In August, 1909, after Van Dyke commenced his improvements on the land, the Railway Company commenced grading across the land on the line surveyed by Jones in November and December, 1908.

10. August 27, 1909, Executive Order directed the elimination of the land from the National Forest, to become subject to homestead settlement on such date as the Secretary of the Interior should prescribe, but not to become subject to entry, filing, selection, or other form of appropriation until the expiration of 30 days from the date so fixed.

11. September 4, 1909, notice was issued by the land department, opening the land to homestead settlement generally on November 22, 1909, but not to entry, filing, or selection until on and after December 22, 1909, with warning that no person would be permitted to gain or exercise any right whatever under any settlement or occupation begun after September, 1909, and prior to November 22, 1909.

12. In September, 1909, the Railway Company was stopped by injunction.

13. September 21, 1909, the map of the original line surveyed in 1906 (which did not traverse the land in question) was, notwithstanding lack of charter authority, approved by the Secretary of the Interior.

14. As the result of negotiations conducted by Van Dyke, which had been pending from December, 1908, a right of way agreement, acquiesced in by Van Dyke, was entered into on September 27, 1909, between the Railway Company and the claimant of the mining locations, whereby the Railway Company was granted right of way of specified and limited widths, across the land.

15. Thereupon the Railway Company laid its track and finished the road sufficiently to enable it to run trains over it early in October, 1909.

16. On the night of November 21, Van Dyke who had been occupying his tent and house from August 15, 1909, walked off the land and at midnight walked back, and continued to occupy his house.

17.—On December 16, 1909, Van Dyke received a conveyance of the title to the alleged mining locations.

18. On December 22, 1909, pursuant to the notice of restoration, Van Dyke filed homestead application, and on February 19, 1912, received patent thereon.

19.—On December 30, 1909, the Railway Company filed a map of amended located line showing the line of road as constructed, and adopted as the definite location of its road by resolution of its board of directors on December 16, 1909; and on March 4, 1911, the same, notwithstanding lack of charter authority, was approved by the Secretary of the Interior, "subject to all valid existing rights."

20. The Railway Company made no claim, by staking the ground or otherwise, to right of way beyond the widths specified in the right of way agreement, until after the amended map was approved in 1911.

SPECIFICATIONS OF ERROR RELIED UPON

The Plaintiffs in error rely upon the following specifications of error stated in the form of propositions:

I.

Van Dyke acquired by his application for examination and listing under the Act of 1906, a preference right of homestead entry and his patent relates back to the date of such application (original application July 26, 1909.)

II.

Van Dyke's occupation and commencement of improvements on August 15, 1909, were the initiation of homestead settlement and his patent relates back to that time, if not to the date of his application for examination and listing.

III.

The land was eliminated from the forest, **ipso facto,** by the Executive Order of August 27, 1909, though still withheld from appropriation other than by homestead settlement, and Van Dyke's settlement, pursuant to the terms of that order as construed by the departmental notice of restoration, was recognized and, if not before, then became effective, and his patent relates back to that time, if not to the time of initiating settlement on the land, or the date of application for examination and listing.

IV.

On November 22, 1909, when the land pursuant to the notice of restoration, became open generally to homestead settlement, Van Dyke was a settler thereon, and his patent relates back at least to that time, if not to the date of his application for listing, the time of initiating his settlement on the land, or the date of the Executive Order.

V.

The Railway Company, by reason of lack of charter authority to build the line of railroad in question, was not a qualified grantee under the Act of 1875 or the Act of 1899.

VI.

While the land was "especially reserved from sale" (from before the filing of the original map until December 22, 1909,) the Act of 1875 did not apply.

VII.

The improvident approval by the Secretary of the Interior of the original map operated only to vest, as between the government and the company, right of way along the line of route shown thereon.

VIII.

The railroad was built on the changed line without authority from the United States.

IX.

The land is question never became subject to the Act of 1875 because Van Dyke had appropriated it by homestead settlement before it became subject to "entry, filing, selection, or other form of appropriation" (Executive Order) on December 22, 1909.

X.

The improvident approval by the Secretary of the Interior in 1911 of the map of amended (constructed) line, operated only to vest, as between the government and the company, right of way along that line and over unappropriated public land, and related back, if at all, only to the time of filing that map.

POINTS OF LAW AND AUTHORITIES

I

Van Dyke Acquired By His Application for Examination and Listing Under the Act of 1906, supra, a Preference Right of Homestead Entry and His Patent Relates Back to the Date of Such Application (Original Application June 5, 1909; Amended Application July 26, 1909.)

The pertinent language of the Act of 1906 is (Sec. 1:)

> "That the Secretary of Agriculture may in his discretion, and he is hereby authorized,

upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves," * * * * * * * which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the list and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this Act.

Upon the filing any such lists or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one mile in length * Provided, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry; * * * and Sec. 5:

"That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this Act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence

upon public lands prior to their inclusion within a forest reserve."

Paragraph 4 of the Regulations of the Department of Agriculture (R. p. 85) provided:

> "Applicants entitled to a preference right under the Act will be permitted to occupy the land applied for by them upon making application to the Forest Supervisor."

The purpose of the Act of June 11, 1906, was not to confer authority upon the Executive to eliminate land from forest reserves, for that power already existed, but to afford intending homesteaders opportunity of initiating, and the machinery for making, homestead entry of land suitable for the purpose.

The filing of application for examination and listing is, therefore, the equivalent of the filing of a homestead application for non-forest land. It is the initiation of proceedings which, if all be regular, result in patent.

The statute declares that the applicant shall have preference right of settlement and entry in case the land be listed. The preference right, however, springs from the application, the act of the applicant—not from the listing, the act of the Secretary of Agriculture.

In case the land applied for be eliminated from the forest under the general power of the Executive, such action is the equivalent of the listing by the Secretary of Agriculture and the declaring open to homestead settlement and entry by the Secretary of the Interior, contemplated by the Actof 1906—the effect is the same so far as throwing the land open to homestead settlement and entry is concerned. Otherwise, it would be in the power of the executive to wholly frustrate

the operation of the Act of 1906 by eliminating in every case by Executive Order under its general power.

The force of these considerations has been appreciated by the land department.

In a communication addressed to the Secretary of Agriculture under date of June 8, 1910, relating to the then contemplated elimination of certain areas from the Manzano National Forest by Executive Order, the Secretary of the Interior said:

> "It is stated in your letter that the lands covered by these applications have not been examined by your department with a view as to determining their agricultural character, inasmuch as they will apparently soon be eliminated from the National Forest and opened to entry under the homestead law as part of the public domain; that many of the applicants, however, have established a residence upon the land applied for and made more or less improvements thereon under special use permits issued by the Supervisor of the Manzano National Forest.
>
> "I have the honor to advise you in reply that it is believed that those who have established residence upon the land under special use permits and who continue to reside thereon to the time when the lands are restored to settlement and entry, will be entitled to a preference right of entry by virtue of their settlement and residence. The lands involved have not yet been eliminated from the forest owing to the necessity of a resurvey of a private land claim embracing a portion of the lands involved, and when they are restored they will be declared open to settlement up-

on a given date, and to entry, filing, and selection at a date thirty days thereafter, thus affording the prospective homesteader and actual settler the advantage."

And in instructions of September 19, 1913 (42 L. D. 425) it was said:

"In a communication from the Secretary of Agriculture, dated June 23, last, he refers to the elimination from the Angeles National Forest, by proclamation of the President of May 17, last, of an area of approximately 100,000 acres, and calls particular attention to the fact that within the area eliminated a large number of tracts had been, prior to said proclamation, listed by his department for restoration under the Act of June 11, 1906 (34 Stat., 233,) upon the applications of persons who were in possession of the lands under special-use permits issued by his department prior to said elimination, and that he had been informed by the district forester at San Francisco that the register and receiver at Los Angeles land office had received no instructions respecting the preference rights of these persons, and, for that reason, the attention of this Department was invited to the matter and request made that appropriate instructions be issued in the premises.

* * * * *

"If, as represented, portions of the lands included within the elimination from the forest by the President's proclamation had prior thereto been listed by the Secretary of Agriculture for restoration under the act of June 11, 1906, upon the application of any qualified homesteader, the preference right

secured to such applicant, and the preference right secured to those having settled upon the land prior to January 1, 1906, where such settlement has since been maintained, is not terminated and defeated by the elimination under the President's proclamation. Under the President's proclamation the general body of the lands eliminated is to be restored at a time to be fixed by the Secretary of the Interior, and I am informed that because of the particular value of these lands some appropriate manner should be fixed, giving equal opportunity to those desiring to secure one of these valuable tracts, with the least possible confusion in the disposition of the lands and expense to the applicants.

"The time and manner of the actual opening to settlement and entry of the major portion of these eliminated lands have not been yet determined upon, but, in my opinion, this fact should not longer withhold from those entitled to a preference right under the act of 1906, the privilege of asserting the same. Further, good administration would require that any claimed preference right within this eliminated area should be ascertained and determined before the general opening occurs, especially if a particular manner of opening be finally determined upon.

"Therefore, I have to direct that you advise the local officers that they should give published notice, through advertisement, requiring **all persons claiming preference rights** in these lands, either under settlement begun prior to January 1, 1906, and since maintained, or **upon application to and listing by the Secretary of Agriculture** of the lands, under the Act of June 11, 1906, to make due

assertion of claim through formal application to enter the land, within 60 days from date to be fixed in the published notice, and that after the expiration of such time the lands may be disposed of without regard to any claimed preference rights. This published notice should be for a period not less than four weeks in one newspaper of general circulation, published in the county in which the lands are situated.

"In this connection your office should carefully investigate the question as to what particular tracts within this eliminated area were in fact listed by the Secretary of Agriculture under the Act of June 11, 1906, upon the application of an individual, and the register and receiver should be directed, in addition to the published notice, to specially notify such applicants of their preferential right of entry within the period named, at the address shown by the records. In the event there are instances of listings under the act of 1906 upon the application of an individual, otherwise than within the elimination in question or within the limits of some other forest, I have to direct that the direction herein given be followed, the purpose being to secure to those entitled to preferential rights the earliest opportunity of enjoying the same."

It will have been noticed that in the case of the Manzano National Forest the lands had **not been examined for listing,** but the applicants were occupying them under special use permits: and in the case of the Angeles National Forest the lands embraced in applications had been listed but not acted upon by the Secretary of the In-

terior, yet preference right was recognized without regard to occupation.

So that, in the one case, the department recognized that "listing" was not essential to preference right, and, in the other, that occupation or settlement was not; thus recognizing, in effect, that application for examination and listing is the essential act.

II

Van Dyke's Occupation and Commencement of Improvements on August 15, 1909, Were the Initiation of Homestead Settlement and His Patent Relates Back to That Time, if not to the Date of His Application for Examination and Listing.

We submit that if Van Dyke's patent be not held to relate back to the time of his application for examination and listing under the Act of 1906, his occupation and commencements of improvements on August 15, 1909 (before the railroad company commenced construction work on the land,) must be regarded as the initiation of homestead right to which his patent relates back.

As noticed before, the act of 1906 provides that "settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries," and the regulations provide that "Applicants entitled to preference right under the act will be permitted to occupy the land applied for by them upon the making of application to the Forest Supervisor."

Van Dyke made such application for permission to occupy the land pending action upon his amended applications for examination and listing and, with the knowledge (if not, as he testified, the actual permission) of the Forest Supervisor,

took up his residence on the land and commenced his improvements on August 15, 1909.

To be sure, in his affidavit filed with his homestead application, Van Dyke inserted November 22, 1909 as the date of his settlement on the land, but "the actual date of settlement may be shown on contest or on final proof though it be earlier than alleged in the application (1 L. D. 444; 3 L. D. 103, 380,) and "the act of settlement is complete from the instant the settler goes upon the land with the intention of making it his home and performs some act indicative of such intent" (2 L. D. 628; 3 L. D. 294; 8 L. D. 176; 10 L. D. 25, 528; 12 L. D. 415.)

And the land department has held (Robert G. McDougall, 43 L. D. 186, syllabus) that "One who applied to have land within a national forest listed for opening under the Act of June 11, 1906, and is thereafter granted a special use permit to occupy the land is entitled, in submitting proof upon his entry made in pursuance of such listing, to credit for residence since the date of the special use permit," saying (p. 187:)

> Sec. 3 of the act of May 14, 1880 (21 Stat., 140), provides, that where any qualified claimant shall settle on any public lands of the United States with the intention of claiming the same under the homestead laws, and thereafter makes entry, his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.
>
> "The Act of June 11, 1906, **supra,** providing for homestead entries in National Forests, provides that the person applying for listing, shall if qualified to make a homestead entry, be accorded preference right of entry when the land is opened, unless there be a prior legal settler on the land. Techni-

cally, this land was not public land and was not subject to general settlement claim at the time this entryman made settlement thereon, but he was not a trespasser, as he had filed his application for listing with the Forest Service for opening under the said act of June 11, 1906, and had been given a special use permit by that service. He was, therefore, in legal occupation of the land after the date of permit, with the understanding that if the tract be found appropriate for opening under said act, he would have a preference right of entry, as provided by that act. He thus had a restricted or qualified settlement claim. If it had resulted that his application for listing could not be allowed, then, of course, his settlement could not have ripened into a claim for title. But the land was opened upon his application, he was accorded preference right of entry, and he made entry, all in pursuance of the claim initiated by his application. No good reason is seen why credit for residence for the full period after the date of the permit may not be accorded under such circumstances. The decision appealed from is, therefore, vacated and the proof will be accepted, unless other objection be found. All decisions and instructions in conflict herewith are overruled."

The case of J. Paul Holden (43 L. D. 525,) while holding that settlement before listing of the land for entry, did not prevent withdrawal under the special Act of February 28, 1911, (36 Stat., 959) for the benefit of the City of Seattle, recognized (pp. 527, 528) the authority of the McDougall case in respect of the homesteader's being entitled to credit for residence before listing of the land, in case he make entry.

If the homesteader be entitled to credit for residence while the land is in reservation his patent necessarily relates back to the initiation of such residence; and in legal effect there can be no difference between residence sanctioned by written permit and residence sanctioned by knowledge and acquiescence of the forest service.

In the face of Sec. 5 of the Act of 1906, a formal special use permit can be no more than evidence of knowledge and acquiescence of the forest service of and in the occupation of the land by the homestead applicant.

The result is that settlement pursuant to application for examination and listing and with the knowledge and acquiescence of the forest service, is effective in case the applicant is permitted to make homestead entry.

III

The Land Was Eliminated From the Forest, Ipso Facto, by the Executive Order of August 27, 1909, Though Still Withheld From Appropriation Other Than By Homestead Settlement, and Van Dyke's Settlement, Pursuant to the Terms of That Order as Construed by the Departmental Notice of Restoration, Was Recognized and, If Not Before, Then Became Effective, and His Patent Relates Back to That Time if not to the Time of Initiating Settlement on the Land, Or the Date of Application for Examination and Listing.

The point thus made, stated in another form, is that, on the date of the Executive Order, the status of the land changed from that of land in forest reservation to that of land specially withdrawn from appropriation other than by **homestead settlement,** with recognition of the rights of homestead settlers then on the land.

The power of the Executive to make such withdrawal is now beyond question (U. S. v. Midwest Oil Co., 237 U. S. 459.)

That the land by virtue of the Executive Order, **ipso facto,** ceased to be forest land subject to the jurisdiction of the Forest Service, is evidenced by the communication of November 2, 1909, from Waha, Chief of Operation, to Van Dyke (Ex. O., R. p. 104,) wherein Van Dyke was informed that the land had been eliminated from the National Forest by the Executive Order and was no longer under the jurisdiction of the Forest Service.

IV

On November 22, 1909, When the Land, Pursuant To the Notice of Restoration, Became Open Generally to Homestead Settlement, Van Dyke Was a Settler Thereon, and His Patent Relates Back at Least to That Time, if not to the date of His Application for Listing, the Time of Initiating His Settlement on the Land, or the Date of the Executive Order.

This alternative proposition is incontrovertible. In the face of Van Dyke's efforts to acquire the land under the homestead law, the nonmineral character of the land and consequent invalidity of the mining locations, and his acquisition of the title to such invalid mining locations merely to eliminate any conflicting claim to the land, the attempt of the court below to hold his status to have been only and exclusively that of a mineral claimant prior to the filing of his homestead application on December 22, 1909, is obvious error.

Van Dyke controlled the title to the invalid mining locations from and after December, 1908, under an option for one year, and conducted the

negotiations with the railway company resulting in the right of way agreement. He testified (R. p. 49) that he **purchased** the title to those claims **before September 27, 1909,** but did not receive the deed of conveyance until on or about December 16, 1909. But, however, that may be, the former claimant of the invalid mining locations made no objection to Van Dyke's homestead proceedings, the government had no concern with the invalid mining locations, and the Railway Company cannot set them up in derogation of Van Dyke's title.

V.

The Railway Company, By Reason of Lack of Charter Authority to Build the Line of Railroad in Question, Was Not a Qualified Grantee Under the Act of 1875 or the Act of 1899.

As to the Act of 1875, Washington and Idaho Railroad Company v. Coeur d'Alene Railroad Company, 160 U. S. 77, 99, is controlling.

And the act of 1899 merely authorized the Secretary of the Interior to file and approve "in the form provided by existing law" surveys and plats of right of way for a railroad over and across any forest reservation, when in his judgment the public interests would not be injuriously affected thereby.

"Surveys and maps of any right of way" "in the form provided by existing law," obviously contemplated procedure and acquisition of right of way under the Act of 1875 in the case of railroads, and has been so understood and acted upon by the land department (See Regulations, **supra)** and by this court (Chicago, M. & St. P. R. Co. v. U. S., 244 U. S. 351.)

In the opinion of the Circuit Court of Appeals in the case cited it is said (218 Fed. 288, at p. 299:)

> "It is first urged that there was no authority vested in the Executive Department to consent to a railway company which was not a qualified beneficiary under the act of 1875 entering upon the public lands for the purpose of constructing a railroad thereon. This objection is disposed of by what has been previously determined as to the power and authority of the Secretary of the Interior to approve surveys and plats of rights of way over the forest reservations."

But the question of lack of charter authority was not presented in that case. In the opinion of the District Court (207 Fed. 165, 166) it appears that charter authority existed and that proper copies of the charter and amendments had been filed with the Secretary of the Interior.

By the language quoted, the Circuit Court of Appeals was merely disposing of the contention that the Secretary of the Interior was without power to permit a railway company to enter a forest reserve for the purpose of construction in advance of approval of a map of its proposed line.

Overlooking the fact that the land in question was "specially reserved from sale" and, therefore, not subject to the act of 1875, and ignoring Van Dyke's status as a homestead applicant and settler, the majority of the court below (Record, pp. 111, 112) took the view that the action of the Secretary of the Interior in approving, on September 21, 1909, the original map filed on November 5, 1908, amounted to a general adjudication that the railroad company was au-

thorized by its charter to build a line between Globe and Miami; that when the railroad company, in August and September, 1909, built the railroad between those points on a line different from the line shown on that map, such alleged adjudication by the Secretary of the Interior as to charter authority attached to such construction so that the railroad company thereby acquired under the act of 1875 right of way along the constructed line; and that as Van Dyke did not initiate his homestead right until December 22, 1909, his right was subsequent and subordinate to the railroad Company's right of way and, therefore, he was without status to raise the question of charter authority.

The majority of the court below thus failed to appreciate that action by the Secretary of the Interior is limited in scope and effect by the matter before him for decision or adjudication. The Secretary had before him only the application for right of way along the line shown on that original map. Right of way along the constructed line was a separate and distinct matter and, as no application therefor was before the Secretary, his action on the map which was before him could not operate to give vitality to right of way by construction on the changed line which, if, in the absence of a map thereof tendered for approval, it could spring into being at all, could vest only by direct operation of the statute.

The act of 1875 requires, as a condition precedent, that a railroad company file with the Secretary of the Interior a copy of its charter and due proofs of organization and such charter must show authority to construct a railroad along a particular line for which right of way is sought. The majority of the court below tacitly conceded that, in respect of a line between Globe and Mi-

ami, the railroad company had not done this and could not do it, because neither its original charter nor any amendment thereof authorized it to build or operate a railroad between those points; but, misconceiving the scope and effect of the improvident approval by the Secretary of the Interior of the original map, held that such approval migrated beyond the confines of the subject matter then before the Secretary and attached to a subject matter (the construction of a railroad on a different line) which was not before him; thus holding that the United States parted with the technical or legal title to right of way along the constructed line, although the same could not vest under the statute because of lack of charter authority, and there was not presented a case of mistaken action by the Secretary of the Interior in approving a map of that particular line which could give, as in Union River Logging Company, v. Noble voidable vitality to right of way.

Hence, irrespective of whether or not Van Dyke's homestead right attached prior to December 22, 1909, and irrespective of whether or not the land prior to that time was "specially reserved from sale" and, therefore, not subject to the act of 1875, the question of whether or not the railroad company was a proper beneficiary under the act of 1875 of right of way along the constructed line between Globe and Miami was an open one not affected or prejudiced by the improvident action of the Secretary of the Interior in approving the original map.

Aside from the other questions presented, it was incumbent upon the railroad company in deraigning its title to show that it had previously filed with the Secretary of the Interior a copy of a charter evidencing authority to build or operate

a railroad between Globe and Miami. This it could not do, and as it could not show even a voidable approval by the Secretary of the Interior of a map of the line upon which the railroad was constructed (until after Van Dyke's right concededly attached,) judgment should have gone against it.

In any event or view Van Dyke was not estopped from raising the question of lack of charter authority. He in no wise could be prejudiced by the improvident approval of the original map which did not affect his land. **Res judicata** could not apply because the subject matters, as well as the parties, were different and distinct. And the doctrine of **stare decisis** has no application to action by the land department and could not in any event operate to extend or perpetuate obviously improvident action.

If the action of the Secretary of the Interior in approving the original map could be regarded as other than improvident, it was, so far as the matter of charter authority is concerned, construction of the language of the charter and amendments thereof on file with him. The construction and effect of a written instrument is a question of law (Swift v. Hocking Valley R. Co., 243 U. S. 281, at 289) and the ruling of the Secretary of the Interior on a question of law may be reviewed by the courts in a proper case.

Gonzales vs. French, 164 U. S. 338.
Quimby v. Conlan, 104 U. S. 420.
Shepley v. Cowan, 91 U. S. 330,
Moore v. Robbins, 96 U. S. 530,
Wiseman v. Eastman, 57 Pac. 398,
Moore v. Carmode, 55 Pac. 217.
Grays Harbor Co. v. Drumm, 73 Pac. 530,
Ross v. Wright, 116 Pac. 949.

Here there was no ruling of the Secretary of the Interior in the instant case. The railroad company could not produce a paper title from the Secretary covering the line of road in question, to which the doctrine of Union River Logging Co. v. Noble might apply. It was part of the case of the railroad company to prove that it had acquired right of way along the particular line involved before Van Dyke's right attached, and charter authority was an essential element which could not be supplied by improvident action of the Secretary of the Interior in approving a map of a different line.

VI.

While the Land Was "Especially Reserved From Sale" (From Before the Filing of the Original Map Until December 22, 1909) the Act Of 1875 Did Not Apply.

This is the necessary result of Sec. 5 of the Act of 1875 and the limited extension of that Act by the Act of 1899, and so held in Chicago, M. & St. P. R. Co., v. U. S. **supra**; See also U. S. v. Henrylyn Irr. Co., 205 Fed. 970, and Utah Power & Light Co. v. U. S. 243 U. S. 387.

VII.

The Improvident Approval By the Secretary of the Interior of the Original Map Operated Only to Vest, as Between the Government and the Company, Right of Way Along the Line Of Route Shown Thereon.

Conceding that under the doctrine of Union River Logging Company v. Noble (147 U. S. 165,) the approval of the original map by the Secretary of Interior vested a grant of right of way (though voidable,) as between the government and the Company, notwithstanding the obvious lack of

charter authority, it is yet clear that such approval operated only so to vest right of way along the line definitely located by that map.

The grant is measured and defined by the application therefor. As said by Mr. Justice McKenna in Stalker v. Oregon S. L. R. Co., 225 U. S. 142 at 148:)

> "When, therefore, the railroad company has exercised its "right to take" a particular tract for station purposes, by filing a survey and plat of the ground selected, the Secretary of the Interior is called upon to interpret the law under which the right to take is claimed, and to determine the lawfulness of the taking, as of the time when the right was asserted by the filing of the plat and survey. When he acts and for the government consents, by approving the plat, his approval operates to give effect to the grant, **the land upon which it operates being thereby definitely determined.** Therefore it is that a claim by another, initiated pending his conclusion, is cut off, by giving effect to the approval as of the date when his action was invoked."

While this was said in respect of a map of station grounds, it is equally applicable to a map of right of way proper, as recognized in the further language of the Court (p. 150:)

> "Another point was involved and decided in the Doughty case; namely, that the approval of the map of alignment by the Secretary of the Interior would not relate to the date of the surveying and staking out of the route. This was manifestly so, since that survey and staking were subject to change at any time before the permanent line was

located by the filing of a map of such location for the approval of the Secretary of the Interior. Therefore it is that the doctrine of relation has always been applied in reference to the date when the official action of the department was invoked to confirm the location thus permanently settled. These points were conclusive against the railroad company and were the only questions for decision. The case was therefore rightly decided."

* * * * *

"The initiatory act, to which the final act of approval relates, is the filing with the Secretary of the Interior of the map of definite location. The mere surveying and staking of a route is the tentative act of the railroad. It might at will select a different route and move its stakes. But when it adopts a route definitely and then causes a map of such route to be filed in the land office of the district, in duplicate, and then filed with the Secretary of the Interior, a right is thereby initiated which, until disposed of, righly precludes the creation of a later right, and gives to the company, as prior in time, priority in right. The foundation for this doctrine of relation is so fully stated and so thoroughly vindicated by the opinion in Weyerhaeuser v. Hoyt, cited above, that we need say nothing more."

VIII

The Railroad Was Built on the Changed Line Without Authority from the United States.

This follows from the two conditions: 1st, that the railroad company was without charter authority, and, 2nd, that during the period of construction and until December 22, 1909, the

land was "especially reserved from sale." (Sec. 5, Act. of 1875.)

1st. The first proposition has already been presented (Point V.)

2nd. Until August 27, 1909, the date of the Executive Order, the land was part of the forest reserve, and from that time until December 22, 1909, it was withdrawn from entry, filing, selection, or other form of appropriation, except homestead settlement (Executive Order.) It was not "public land" within the meaning of the Act of 1875, but "land especially reserved from sale" (Sec. 5, same act) and, therefore, not subject to appropriation to railway right of way.

The executive has power so to withdraw land from appropriation (U. S. vs. Midwest Oil Company, **supra.)**

The railroad company's original map was approved on September 21, 1909, during the period of construction on the changed line, but that approval was operative only to vest right of way upon the line definitely located by that map (Point VI **supra.)**

And, as pointed out, no permission was given the railroad company to proceed with construction work in the forest reserve. Even if such permission had been given in April or July, 1909, as assumed by the court below, it would have been directed, and applicable only, to the line definitely located by the original map, which was the specific subject matter then before the land department for consideration.

But even permission to proceed with construction is not grant of right of way.

The physical presence of a constructed railroad, without ownership of right of way, was the

situation presented in the Chicago, M. St. P. R. Co. case, **supra,** where permission to proceed with construction work had been obtained pending action on the right of way map.

A similar situation was presented in Utah Power & L. Co. vs. U. S. (243 U. S. 387) where works employed in generating and distributing electric power had been constructed in a forest reserve with the knowledge and acquiescence of officers of the forest service, but without application for right of way or permit under the laws applicable in such case.

IX.

The Land in Question Never Became Subject to the Act of 1875 Because Van Dyke Had Appropriated it by Homestead Settlement Before it Became Subject to "Entry, Filing, Selection, or Other Form of Appropriation" (Executive Order) on December 22, 1909.

As hereinbefore shown (Points I.-IV) Van Dyke's homestead right by settlement attached on November 22, 1909, if not before, and took, or would have taken, precedence over the right of way which the railroad company (its railroad being already constructed) might have acquired on December 22, 1909, if the land had not been appropriated by Van Dyke and the company had been a qualified beneficiary under the Act of 1875.

X.

The Improvident Approval by the Secretary of the Interior in 1911 of the Map of Amended (Constructed) Line, Operated Only to Vest, As Between the Government and the Company, Right of Way Along That Line and Over Unappropriated Public Land, and Related Back, If at All, Only to the Time of Filing That Map.

As said in Stalker vs. Oregon, S. L. Co., 225 U. S. 142, at 152:

> "The initiatory act to which the final act of approval relates, is the filing with the Secretary of the Interior of the map of definite location."

The court there was speaking of the approval of a map filed by a company having charter authority and which had complied with the precedent requirements of the Act of 1875. When there is palpable lack of charter authority, it is questionable whether approval has any relation back of its date. But, however, that may be, the approval here was impotent to reach back of the date of filing of the amended map.

If a railroad be constructed over unappropriated public land by a proper beneficiary under the Act of 1875, right of way is acquired direct from the Act of 1875. The subsequent filing and approval of a map of the constructed line has no function so far as the vesting of right of way is concerned. And if a railroad be constructed under conditions where right of way does not spring from such construction, the approval of a subsequently filed map of the constructed line cannot reach back and vest the railroad company with a right which it did not have at the time the map was filed. The act of the Secretary of the Interior in approving a right of way map cannot relate back of the time when his function under the Act of 1875 was invoked by tender of the map for approval. (Stalker v. Oregon S. L. Co., **supra.)**

We respectfully submit that the judgment of the Supreme Court of Arizona should be reversed.

RICHARD E. SLOAN,

F. C. JACOBS,

Attorneys for Plaintiffs in Error.

Of Counsel,

CLARK, PRENTISS & CLARK.

APPENDIX.

4-207.

"B" DEPARTMENT OF THE INTERIOR,

C.R.G.O. GENERAL LAND OFFICE,

WASHINGTON, D. C., May 4, 1918.

I hereby certify that the annexed copies of papers are true and literal exemplifications from the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal United States General Land Office.]

D. K. PARROTT,
Acting Assistant Commissioner of the General Land Office.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Cleve W. Van Dyke, being first duly sworn, deposes and says that he is a citizen of the United States and resident of Miami, Gila County, Territory of Arizona;

That he presents herewith application to enter under the Homestead laws of the United States certain tract of land situated in Gila County, Arizona Territory, and described as follows, to-wit:

S.E.¼ of sec. 30, T. 1-N., R. 15 E., G. & S. R. B. & M. and does hereby claim the right to enter said land under said application of homestead entry, and does hereby protest about the receipt or allowance by the Land Office of application by or on behalf of any other person to enter said lands or any portion thereof, and affiant bases his right of entry upon application made upon said lands under the following circumstances:

That in the month of November, 1908, affiant purchased of various claimants mineral rights and mining claims covering the greater portion of said quarter section; that thereafter affiant discovered said land was non-mineral in character, and in March of the year 1909, affiant surveyed and explored said land, ascertaining therefrom its non-mineral character, and immediately thereafter took steps to have said land listed by the Forest Reserve so that he could ultimately acquire the title to said land under the homestead laws; that on or about the 13th day of May, 1909, affiant applied at the United States Land Office, at Phœnix, Arizona, to enter the W.½ of said quarter section and other lands as a homestead, and that said application was refused upon the ground that the land in question was included within a Forest Reserve, and affiant was referred by the Land Office officials to Theodore T. Swift, Supervisor of Forest Reserve, and that on the 5th of June, in the same year, affiant mailed his application to have the W.½ of said quarter section and other lands listed to the Forestry Department at Washington, D. C.; that sometime in the month of July the said Theodore T. Swift, as such Supervisor of Forest Reserve, gave to affiant verbal permission to go upon and occupy the W.½ of said quarter section, placing thereon such improvements as he might see fit to make; that shortly thereafter affiant placed a tent upon the W.½ of said quarter section, and later on, in August of the same year, affiant delivered upon said lands material for the construction of a frame dwelling house, and shortly thereafter commenced and carried on the actual work of construction of said house; that said work of construction was kept up continuously until the practical completion of said building, at a cost to affiant of about $2,000; that promptly at the hour of 12 o'clock midnight of November 21, 1909, affiant took up his residence in said house and continuously since then has resided therein and is now residing therein, and has made said land and premises his home and permanent residence. Shortly after the 22d of November, 1909, affiant commenced the construction of a fence inclosing said land, and thereafter and before the first of December, the present year, affiant completed the construction of a wire fence inclosing all of said land; said fence consisting of posts and three barbed wires; that affiant entered and occupied said S.E.¼ as aforesaid without objection or interference, and that at the time of such entry there were no buildings or improvements of any kind upon said land, excepting those

placed thereon by affiant, and that so far as affiant knows, or is informed, there was no other person occupying said lands at the time of his entry adversely to him.

Further affiant says not.

CLEVE W. VAN DYKE.

Subscribed and sworn to before me this 22d day of December, 1909.

O. E. SCHUPP,
Notary Public.

My commission expires April 26, 1910.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

A. R. Malone, being first duly sworn, deposes and says that he is a resident of Miami, Gila County, Arizona; that he is well acquainted with Cleve W. Van Dyke, and knows the land described as the S.E.¼ of sec. 30, T. 1 N., R. 15 E., G. & S. R. B. & M., Gila County, Territory of Arizona;

That affiant knows that the said Cleve W. Van Dyke has placed valuable improvements upon said lands, including a six-room house at a probable cost of more than $2,000, three-strand barbed wire fence inclosing all of said lands, and that affiant in company with said Cleve W. Van Dyke went upon said lands at the hour of 12 o'clock midnight of the 21st of November, 1909, and that ever since has made his home upon said premises.

Further affiant says not.

A. R. MALONE.

Subscribed and sworn to before me this 22d day of December, 1909.

O. E. SCHUPP,
Notary Public.

My commission expires April 26, 1910.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Joseph F. Chisholm, being first duly sworn, deposes and says he is a resident of Miami, Gila County, Territory of Arizona; that he is well acquainted with the land described as the S.E.¼ of sec. 30, T. 1 N., R. 15 E., G. & S. R. B. & M., Gila County, Arizona; that he is well acquainted with Cleve

W. Van Dyke; that affiant saw the said Cleve W. Van Dyke upon said lands shortly after the hour of midnight of November 21, 1909, and since then affiant has seen the said Cleve W. Van Dyke upon said lands every day and knows that he has made his home upon said lands in the house constructed thereon until the 16th day of December, 1909.

Affiant further states that prior to the 22d day of November said Cleve W. Van Dyke had placed upon said premises a six-room house of the value of more than $2,000, and that since said entry said Cleve W. Van Dyke has inclosed said premises with a fence consisting of posts and three strands of barbed wire.

Further affiant says not.

JOSEPH F. CHISHOLM.

Subscribed and sworn to before me this 22d day of December, 1909.

O. E. SCHUPP,
Notary Public.

My commission expires April 26, 1910.

(38407)

Office Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1918

No. 59.

CLEVE W. VAN DYKE, IDA A. VAN DYKE
HIS WIFE, AND PATRICK H. McGUIRE,
Plaintiffs in Error

vs.

ARIZONA EASTERN RAILROAD COMPANY,
A CORPORATION
Defendant in Error

CHARLES L. RAWLINS,
Attorney for Defendant in Error

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POINTS OF LAW AND AUTHORITIES

I.

When the Secretary of the Interior has granted a railroad company permission to enter a forest reserve under the Act of March 3, 1899, and it has entered and constructed its road, or had its profiles approved in advance of construction, under the act of March 3, 1875, it will be presumed that all preliminary steps necessary to such decision or approval have been taken, and the same is equivalent to a patent. Such decision or approval cannot be set aside by collateral attack and is subject only to direct attack by the Government, and cannot be questioned by strangers or private parties. VII Brief Page 53-58

II.

The railroad company was granted two permissions to enter the forest reserve and construct its road: One, by the approval of its profile on September 21, 1909, filed November 5, 1908; the other by permission being granted for such purpose July 6, 1909, on application filed April 16, 1909. Plaintiffs in error contend that defendant in error acquired no right to enter and construct its road within the Forest Reserve for the reason it entered without permission. If this be a fact, the Government alone can raise this question. VIII. Brief, Page 58-64

III.

When did Mr. Van Dyke first make his homestead settlement under the act of June 11, 1906, and the rules and

regulations promulgated thereunder? When did the rights of the railroad company attach to the premises under the acts of 1875 and 1899? IX. Brief, page 64-78

IV.

The granting to appellee permission to enter and approval of its profiles by the Secretary of the Interior qualified defendant in error, under the act of March 3, 1899, to enter the forest reserve, and under the act of March 3, 1875, as a grantee of the premises in dispute. This approval was equivalent to a patent, and related back, at least, to the date of construction of the road.

A right of way over public lands may be obtained in two ways, even over a Forest Reserve after permission, as such land, after elimination, became public domain:

1. Actual construction of the road;
2. Upon approval of the Secretary of the Interior after a definite location and filing of profile of the road in the local land office.

Actual construction of the road is certainly unmistakeable evidence and notice of appropriation, and the filing of the profile in such case is unnecessary. X. Brief, page..... 78-87

V.

Distinguishing the case of Washington & Idaho Railroad Company vs. Coeur d' Alene, and the case at bar;

Congress has fixed the amount of the grant and determined that amount was necessary for a railroad right of way. Such right of way, or any part thereof, cannot be lost by adverse possession, however long the possession has continued, and property stakes fixing the exterior boundary lines are unnecessary and not required by the act of March 3, 1875. XI. Brief, page 87-96

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In the Supreme Court of the United States

OCTOBER TERM, 1918

No.....

CLEVE W. VAN DYKE, IDA A. VAN DYKE
HIS WIFE, AND PATRICK H. McGUIRE,
Plaintiffs in Error

vs.

ARIZONA EASTERN RAILROAD COMPANY,
A CORPORATION
Defendant in Error

APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR DEFENDANT IN ERROR

Statement of Facts by plaintiffs in error being insufficient, the defendant in error makes the following Statement of Facts:

It will be noted that the Arizona Eastern Railroad Company is successor to the Gila Valley, Globe and Northern Railroad Company (Transcript of Record, p. 20, f. 37, Finding 1). For brevity we will use only the

Arizona Eastern Railroad Company as was done by the trial court in its judgment and findings.

Defendant in error, during the month of March, 1906, under the act of Congress, approved March 3, 1875, and the act of March 3, 1899, surveyed its line of road known as the Miami Extension from Globe to Miami (Transcript of Record, pp. 78-79, f. 161a). Said line passed over and across certain public lands of the United States and over and across certain lands thereafter included within the Crook National Forest Reserve. A profile or map of this right of way was filed in the local land office, at Phoenix, Arizona, on November 5, 1908. (Filing date endorsed on profile or map, R., pp. 78-79, f. 160-161). On April 16, 1909, written application to the United States Department of Agriculture, Forest Service, with map of right of way attached, was made by defendant in error to enter and extend its line across a portion of the Crook National Forest. (R., Ex. "4", p. 79, f. 161). On July 6, 1909, said Forest Service recommended that the railroad company's said application be approved (R., Ex. "5", p. 80, f. 162). An amended survey was made upon the ground in November and December, 1908, over the premises in dispute, and the line was never changed after that date and the road was constructed upon that survey (R., p. 40, f. 77). On September 21, 1909, the Secretary of the Interior approved said profile or map of appellee's line of said railroad through said National Forest Reserve and endorsed his approval upon said map (See indorsement of photograph copies at pp. 78-79). This line entered and crossed Section 30. Defendant in error thereafter changed its line of location on said Crook National Forest so as to cross the N. W. ¼ of the N. W. ¼ of the S. E. ¼, as shown by the amended survey map

(Photograph copies, R., pp. 78-79, f. 79). Defendant in error commenced the construction of its road upon this amended survey over the premises in dispute in August, 1909, and completed the same over said premises in September, 1909 (R. p. 41, f. 78), and in the first part of October, 1909, trains were running over the same (R., p. 39). This extension of appellee's railroad from Globe to Miami is between nine and ten miles, and defendant in error began the construction thereof in April, 1909, and completed the same in September, 1909, (R., p. 40, f. 76), and operated trains thereover by October 1, 1909. (R., p. 39, f. 73). The amended map or profile which was made in November and December, 1908, showing the center line changes as stated upon the ground and as it crossed the premises in dispute, was filed in the local land office. at Phoenix, Arizona, on December 30, 1909, which was within one year after the said survey, as required by Section 4 of the Act of Congress of 1875, and this section of construction was less than twenty miles over surveyed lands, and the same was approved by the Secretary of the Interior on March 4, 1911 (Amended Map of Location, pp. 78-79, with notations of filing and approval noted thereon).

At the time the defendant in error entered upon the premises in dispute and prior thereto, the said premises were within said forest reserve and held and claimed under mining locations by the Miami Land and Improvement Company, a corporation (R., p. 22, Finding 12). Defendant in error not only had authority and permission from the United States to enter said Crook National Forest Reserve, but had authority and permission to cross said mining claims from the Miami Land and Improvement Company, a corporation, which

was the owner and in possession of said premises at the time defendant in error entered and constructed its said railroad thereover. Mr. Van Dyke claims to have had an option to purchase said mining claims owned by the Miami Land and Improvement Company (R., p. 49, f. 96), and he claims to have taken the option in September, 1908, but he did not, on the trial, or at any other time, offer the option in evidence, and whether he ever had such an option defendant in error has no knowledge, except his bare statement that the instrument he had was an option, which is a mere conclusion. Mr. Van Dyke claims to have received a deed for said mining claims on December 16, 1909 (R., p. 49, f. 97), but no deed was ever produced or offered in evidence. This he claims was after the railroad was constructed across the mining claims (R., p. 49, f. 97). Mr. Van Dyke was holding possession under these mining claims for the owners on August 15, 1909, when he gave a contract for his house thereon (R., p. 47, f. 92), and when he put his tent there on December 15, 1909 (R., p. 50, f. 97), he was then looking after the interest of the Miami Land and Improvement Company and at that time he had secured no title, (R., p. 50, f. 97). On June 5, 1909, Mr. Van Dyke applied to the Forest Department (R., p. 84, f. 171, Ex. "B") to have certain lands eliminated from the Crook National Forest Reserve from settlement under the homestead laws, and on July 26, 1909, Mr. Van Dyke made an amended application for the same purpose to the District Forester, Albuquerque, New Mexico, (R., p. 88, Ex. "C", f. 179), after appellee had applied to enter the forest reserve and had made its amended survey and its road had been surveyed and staked. To these applications

Mr. A. C. Waha, Acting Chief of Operations, answered Mr. Van Dyke as follows:

(Letter without date).

> "The local land office reports that the N. W. ¼ S. E. ¼, Section 30, T. 1 N., R. 15 E. is covered by H. E. No. 1654, of F. S. Toombs, made May 21, 1908".
>
> "In the absence of a reply within 30 days, it will be assumed that you do not care to amend and examination will be made accordingly.
>
> 403272- 2B.
>
> "Mr. C. W. D. If you conclude not to amend and are satisfied as to the agricultural character of land applied for and wish to begin cultivation and occupation at once, you should apply, in person or by writing, to Forest Supervisor T. T. Swift, Safford, Arizona, for a free Special Use Permit for that purpose." (R., p. 89, f. 181-182, Ex. "E").

The above shows that the N. W. ¼ of the S. E. ¼ of Section 30 was, on the date of Mr. Van Dyke's application, July 26, 1909, claimed by Homestead Entry No. 1654 of F. S. Toombs since May 21, 1908. On August 10, 1909 (R., p. 90, Ex. "F"), Mr. Van Dyke was advised that the N. W. ¼ of the S. E. ¼ of Section 30, was then vacated.

Mr. Van Dyke went to see Mr. Swift, Forest Supervisor, at Safford, Arizona (R., p. 46, f. 90) and claims that Mr. Swift gave him verbal permission on July 26, 1909, (R., p. 47, f. 91), and on that date he made an

amended application while in Mr. Swift's office at Safford, (R., p. 46, f. 90), and on this same day, at Globe, Arizona, July 26, 1909, Mr. Van Dyke made application (R., p. 88, f. 180). Mr. Van Dyke, on cross-examination, stated: "That is my understanding, he gave me a verbal permission to go upon the Crook National Forest, upon this ground named."(R., p. 48, f. 93).

On December 22, 1909, Mr. Van Dyke went off the ground and back on at midnight and took up his residence (R., p. 48, f. 94). Mr. Van Dyke says that at the time he was talking to Mr. Swift there were mining claims over a portion of these lands. They covered the right of way and where the house was (R., p. 49, f. 96). Mr. Swift, Forest Supervisor, states that he did not at any time offer to give Mr. Van Dyke a special use permit to occupy any portion of that ground. He did not grant Mr. Van Dyke a special use permit to occupy this ground such as he testified to, and did not give Mr. Van Dyke a special use permit to occupy the land involved in this litigation, and did not give him one in writing (R., pp. 50-51, f. 99-100). Mr. Swift further says: "I don't issue verbal permits" (R., p. 51, f. 101). "*They are all a matter of record*" (R., p. 51, f. 101).

On August 27, 1909, the President of the United States issued a General Executive Order reducing said Crook National Forest Reserve and excluded certain lands which were not embraced within any other WITHDRAWAL, RESERVATION or APPROPRIATION (R., p. 81, f. 165 Ex. "6"). After Mr. Van Dyke was refused a special use permit by Mr. Swift, the Forest Supervisor in charge. Mr. Van Dyke received another letter from the Forest Service at Albuquerque, New Mexico, dated September 17, 1909, in which the Department replied to Mr. Van Dyke's letter of Auguest 30,

1909 (R., p. 90, f. 185, Ex. "G"). This letter of Mr. Van Dyke's of August 30, 1909, however, was not offered in evidence by him, but on November 2, 1909, Mr. Van Dyke received a letter from the same Forest Service notifying him that his application for land in the Crook National Forest Reserve was rejected (R., p. 104, f. 214, Ex. "O"). This certainly shows that the application of Mr. Van Dyke was not the moving cause in procuring the land in question to be withdrawn from the Crook National Forest, if he had a preferential right why did he take up his residence at midnight on December 22, 1909. It will be remembered that during all this time defendant in error had its road constructed and in operation, Mr. Van Dyke entered and filed his application for homestead with the local Land Office, at Phoenix, Arizona, on December 22, 1909. Defendant in error placed property stakes marking its boundary line through this property in early part of 1911, a short time after December 22, 1909, and Mr. Van Dyke removed the same (R., pp. 43-44, f. 84). Defendant in error thereafter brought this action to recover that portion of the right of way claimed and in the possession of the plaintiff in error, and was awarded judgment therefor.

I.

It may be well at the outset to set forth the portions of the acts of Congress of March 3, 1875, and March 3, 1899, and the rules and regulations affecting the rights of the parties thereunder. Section 1 of the act of Congress, approved March 3, 1875, 18 Stats. at Large, page 482, provides:

> "That the right of way through the public lands of the United States is hereby granted

to any railroad company duly organized under the laws of any State or Territory, except the the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road.

Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The act of Congress, approved March 3, 1899, 30 Stats. 1233, is as follows

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

The Use Book, a Manual for Users of the National Forest, 1913, issued by the Secretary of Agriculture,

July 1, 1913, and The Use Book 1908, issued by the same department, provide as follows:

Easements.

"The following rights of way, amounting to easements across National Forest lands are provided for by Congress and are under the jurisdiction of the Secretary of the Interior." Page 70.

Railroad Grants.

"The act of March 3, 1875 (18 Stats., 482), in so far as it is extended over National Forests by the act of March 3, 1899 (30 Stats., 1233), grants rights of way for railroads." (Page 70). This same provision is in The National Forest Manual, issued by the Secretary of Agriculture, effective May 1, 1911, on page 22; and to the same effect in The Use Book 1908, on page 289. "Amendatory Circular, April 25, 1906."

Rights of Way Under Special Use Permits.

"Rights of way can also be obtained from the Department of Agriculture under special-use permit. These can not be transferred and are terminable in the discretion of the Secretary. They usually cost much less, however, for surveys and maps. Page 71. This regulation goes back to April 25, 1906, see "The Use Book" of 1908, issued by the Secretary of Agriculture, page 287."

Applicant may Choose Form of Permit.

"Application may be made for either an easement or a special-use permit, or for both, as the applicant may choose. The granting of an Interior Department right of way supersedes the permit issued by the Department of Agriculture. Either form of permit requires the applicant to enter into such stipulations and execute such bonds as the Forest Service may require for the protection of the National Forests." Page 71.

General Land Office Regulations covering railroad rights of way over public lands, approved May 21, 1909, and the foregoing requirements were substantially required as far back as April 25, 1906. See The Use Book, 1908, page 287.

2. National Forest—When a right of way is located within a national forest the applicant must enter into such stipulation and execute such bond as the Forest Service may require for the protection of such national forest.

3. Proposed National Forest—When a right of way is located within a proposed national forest the applicant must file a stipulation under seal incorporating the following:

"No construction will be allowed in a national forest or a proposed national forest until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved, or has been considered by this department, and

permission for such construction has been specifically given".

An act to provide for the entry of agricultural lands within the Forest Reserves, approved June 11, 1906, (34 Stats. at L. 233).

"Sec. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this Act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve" (R., p. 87, f. 176).

"1. Applications must be made upon this form, signed by the applicant, and mailed to the Forester, Washington, D. C." (R., p. 85, Reg. 1, f. 172).

"3. The fact that an applicant has settled upon the land will not influence the decision with respect to its agricultural character. Settlement after January 1, 1906, and in advance of the opening by the Secretary of the Interior, is not authorized by the act, confers no rights, and will be considered trespass." (R., p. 85, Reg. 3, f. 172).

II.

Answering plaintiffs in errors' brief, defendant in error will begin with the statement on page 11 of the brief, and the succeeding statements will be noted by

the defendant in error in the order presented by the plaintiffs in error:

1. Plaintiffs in error admit that the only conflict of evidence in the case was whether Mr. Swift had given Mr. Van Dyke a verbal special use permit. The judgment of the court, to our mind, forecloses this controversy. If there was a conflict in this testimony, the court by rendering the judgment found for the defendant in error, thereby holding that Mr. Van Dyke did not receive a Verbal Special Use permit, nor any other kind of a permit, from the Supervisor, Mr. Swift, to enter this forest reserve. Mr. Swift, in his testimony: "I did not at any time offer to give Mr. Van Dyke a special use permit to occupy any portion of that ground. I did not grant Mr. Van Dyke a special use permit to occupy this ground such as he testified to. I did not give Mr. Van Dyke a verbal special use permit to occupy the land involved in this litigation, and did not give him any in writing. I do not issue verbal use permits. THEY ARE ALL A MATTER OF RECORD." (R., p. 51, f. 100-101). This is a clear, positive statement of an official of the federal government and who has no interest in this litigation.

2. Plaintiffs in error, on page 12 of their brief state:

> "Railroad Company was without charter authority to build a railroad between Globe and Miami."

The Secretary of the Interior is by the said acts of Congress empowered to determine the questions complained of by Mr. Van Dyke in this action and the decisions and findings of the Secretary are final, con-

clusive and cannot be attacked in this character of case, and on the pleadings submitted by the plaintiffs in error. It is not necessary to name the point of origin and destination of the proposed constructed railroad in order to make the application, and the findings of the Secretary and approval of the maps by him are final and binding. The Secretary could consider any evidence necessary to make a decision under said acts of Congress and in order to enable him to approve the profiles of the proposed road. Under this head plaintiffs in error, on page 13, state:

> "A second branch line commencing at some convenient point on the above-mentioned branch line east of Dripping Springs Wash and crossing the Gila River to some convenient point on the Arizona Eastern Railroad."

This being one of the provisions of the amended charter of the defendant in error, it might have been sufficient within itself for the Secretary of the Interior to have approved its maps over the premises in controversy. Plaintiffs in error cannot question the corporate power of the defendant in error to construct its road over Government land granted to it by the acts of Congress and the acts of the Secretary of the Interior, such as was done in this case. All that is necessary for the acts of Congress to take effect and the acts of the Secretary to become effective, is that there shall be some public lands over which the Government of the United States has not lost control.

We refute counsels' statement, on page 14 of the brief, as follows:

> "In the affidavit of Epes Randolph attached to that map, it is falsely asserted that

the Railway Company was authorized by its charter to build a railroad on that line."

The act of March 3, 1875, does not require amended articles of incorporation to be filed with the Secretary of the Interior, nor additional proof of organization. The filing of the original articles and proof required, was on October 1, 1896 (Par. II, R., p. 2; page 13 Brief Plaintiffs in Error and admitted by Answer, Par. II, R., p. 9, f. 17).

Mr. Van Dyke's testimony as to his settlement prior to the construction and operation of the railroad over the premises in dispute was not in good faith and was an after-thought. Mr. Van Dyke's own testimony will disclose that he did not orginally enter the premises for the purpose of availing himself of the homestead laws any more than of the mining laws. Failing to establish a homestead settlement under the mining claims owned by a corporation, he sought to have such occupancy and possession treated as his own possession and occupancy. Among other things, Mr. Van Dyke testified:

> "I was holding possession under those mining claims when I put my tent there on the 15th day of December" (R., p. 50, f. 97-98); "and was holding possession under those mining claims when I put the lumber there to build my house" (R., p. 50, f. 97-98). "These I presume for the Miami Land and Improvement Company. I was looking after their interests. I hadn't received title yet." (R., p. 50, f. 97-98). "It is a fact that about midnight on the 22nd day of December, 1909, I took up my residence in the house testified to. That is, I went

off the ground and back on again at midnight". (R., p. 48, f. 94).

This clearly shows that his homestead possession or settlement was initiated at midnight on December 22, 1909, and the possession, settlement and occupancy prior thereto was for the use and benefit of the Miami Land and Improvement Company, a corporation, the then owner of the premises, and under the law and rules Mr. Van Dyke was compelled to give up his settlement under mining claims and to make a settlement under the homestead laws.

3. Plaintiffs in error, on page 14 of their brief, state:

"The LAND WAS in a Forest Reserve."

Plaintiffs in error seem to take the position that a compliance with the act of March 3, 1899, alone gives the railroad company its grant. It has been the rule of this court that the construction placed by heads of departments, such as the Secretary of the Interior and Secretary of Agriculture, under the acts of March 3, 1875, and March 3, 1899, will be followed unless they plainly violate the meaning and intention of the acts. To this end these two departments of the Government have issued what is known and called The Use Book, a Manual for users of the National Forests, 1913, issued by the Secretary of Agriculture, July 1, 1913, and The Use Book, 1908, issued by the same department. (Under I of this brief).

Defendant in error first surveyed its right of way onto a part of Section 30 in March, 1906, and this section was included for the first time in the Tonto Na-

tional Forest Reserve January 13, 1908. On the 5th day of November, 1908, the defendant in error adopted said survey and filed a map thereof in the local land office, at Phoenix, Arizona. Therefore, it may be that the approval of said map on November 5, 1909, by the Secretary of the Interior, as shown upon said photograph maps (R., pp. 78-79, f. 161a-161b), would initiate appellee's title as of the date of filing said map. The changing of the line of the railroad so as to cross the premises in dispute was permissible under the laws of Congress, provided in doing so the railroad company did not infringe upon any existing rights at the time of the change. At the time the railroad company entered upon and constructed its road across the premises in dispute, the Miami Land and Improvement Company, a corporation, was the owner and in possession of the premises under valid mining locations. They were not owned by the plaintiffs in error, or either of them, or in their possession, neither were the premises subject to homestead entry at the time, and none of the written exhibits offered by appellants in evidence show that they ever acquired, at any time, any interest in said premises prior to the time Van Dyke entered at midnight and filed his homestead entry in the local land office, at Phoenix, Arizona, on the 22nd day of December, 1909.

4. Plaintiffs in error, on page 16 of their Brief state: "Van Dyke went into possession under an option on alleged mining claims."

The trial court found that Mr. Van Dyke at the time of making the order of segregation (August 27, 1909) was occupying the land in controversy as mining claims for the owner, the Miami Land and Improvement Company (R., Finding 10, p. 21, f. 40); that the plaintiffs

in error, nor any of them, were in possession or entitled to possession at the time defendant in error entered upon said premises, surveyed, staked and constructed its said railroad (R., Finding 12, p. 22, f. 41). As late as December 15, 1909, Mr. Van Dyke was holding possession, under the mining claims under his alleged option, and when he put his lumber there for his house for the Miami Land and Improvement Company, Mr. Van Dyke was looking after interests of the Miami Land and Improvement Company and not his homestead interest (R., p. 50, f. 97-98).

5. Plaintiffs in error state on page 16 of their brief:

"Departmental Action on the Railway Company's Original Application for right of way."

Plaintiffs in error concede the filing of the map and permission dated July 6, 1909 from the Forest Service, to enter and construct thereon the railroad in question, but object to the action of the Secretary of the Interior in approving our application and map to enter on September 21, 1909. Our title will relate back, at least, to the date of actual construction of the road, to wit, about the first part of August, 1909 (R., p. 41, f. 79). Ties and rails were laid over the premises in dispute the first part of October, 1909, (R., p. 39, f. 73). and the defendant in error, in November and December, 1908, marked and staked its said line of railroad and right of way on the ground to the extent of 100 feet on each side of said center line, as provided by said act of Congress, and did, in August and September, 1909, complete the construction of said railroad over and across said premises as staked and marked on the ground. The survey of November and December, 1908,

was never changed after it was then surveyed, and the railroad was constructed upon that survey (R., p. 37, f. 70).

6. Plaintiffs in error set out on page 17 of their brief:

> "The Railway Company had no authority from the United States to Build a Railroad in the Forest Reserve across the Land in Question."

The railroad company did, before entering the Forest Reserve, apply for and receive permission to enter the same. The application is dated April 16, 1909 (R., p. 79, Ex. "4", f. 161), with enclosed maps of right of way permission to enter the Crook National Forest Reserve, and on July 6, 1909, this permission was granted (R., p. 80, Ex. "5", f. 163). (See endorsement on photograph copy of map showing the approval of the forest department, pp. 78-79, f. 161a-161b). This permission will relate to and take effect as of the date of the application. This, therefore, takes the railroad company's right to enter the forest reserve as of date of April 16, 1909. It is provided by the Use Book, on page 71, as follows:

> "The grant of an Interior Department right of way supersedes the permit issued by the Department of Agriculture."

The rules promulgated and set forth in this Use Book have been heretofore by appellee set forth (under I of this brief). The approval of the map, (R., p. 78-79, f. 161a-161b) by the Agricultural Department, Forest Service, and the Secretary of the Interior being indorsed thereon, is sufficient authority for the railroad company

to enter and construct its road. The Forest Reserve was first created on January 13, 1908, and the original map of survey was filed with the Secretary of the Interior on the 5th day of November, 1908, but this survey was made in March, 1906, and the President's Proclamation eliminating the same from the Forest Reserve was promulgated on August 27, 1909, is in part as follows:

> "The lands hereby excluded from the Crook National Forest which are not embraced in any other withdrawal, reservation or appropriation, shall be restored to the public domain and become subject to settlement under the general provisions of the homestead laws." (R., p. 80, f. 164-165, Ex. "6").

This proclamation did not restore to the public domain the right of way granted by the Secretary of the Interior on November 5, 1908, when he approved the original map of the railroad company, neither did it destroy the right of the railroad company to enter and construct its road within the Crook National Forest Reserve under its application with map of right of way attached, and such permission dated July 6, 1909, would relate to the date of said application on April 16, 1909. This proclamation did not restore to the public domain the rights of the railroad company acquired under its permission of July 6, 1909, and the actual construction road over the premises in dispute. A right of way can be acquired by actual construction on the ground through a Forest Reserve, provided the railroad company first obtains permission to enter the same from the Department of the Interior, and such permission, ipso facto, eliminated 100 feet on each side of the center line from the forest reserve. If a railroad company

should contruct its road through a forest reserve without this permission, the only party that could raise the question and complain of such construction prior to permission would be the Government of the United States. The Secretary of the Interior approved appellee's original map on September 21, 1909. That approval was, in effect, a decision of the Secretary of the Interior that the appellee was a qualified grantee under the acts of Congress, approved March 3, 1875, and March 3, 1899, and was authority for appellee to enter the said forest reserve and to construct its road over the forest and the public lands of the United States from Globe to Miami, and this decision cannot now be questioned by a stranger or intermeddler.

Oregon Trunk Line vs. Deschutes R. Co., 172 Fed. on page 742.

7. Plaintiffs in error, on page 21 of their brief say:

"Van Dyke's Status as a Homestead Applicant."

There is no evidence of the contents of the alleged option upon the premises to plaintiffs in error, only the statement of Mr. Van Dyke that he had such an instrument. Therefore, no one had an opportunity to examine the contents of the instrument testified to by Mr. Van Dyke, and he only gave his opinion as to the effect of the instrument. If he did have an option, under his own statement, he never exercised the same until after the premises in dispute had become public lands of the United States. He says that he received his deed on December 16, 1909 (R., p. 49, f. 97). There being no privity of estate between the Miami Land and Improve-

ment Company and Mr. Van Dyke, he, Van Dyke, cannot claim his possession under his alleged option or the mining claims as his homestead settlement prior to the premises being opened for homestead settlement. Mr. Van Dyke's own settlement can alone be considered, unaffected by his alleged option on the mining claims, as he testified:

> "I was holding possession under these mining claims when I put my tent there on the 15th day of December, and when I put the lumber there to build my house. This, I presume for the Miami Land and Improvement Company, I was looking after their interests" (R., p. 50, f. 97).

We are concerned here with the question: When did Mr. Van Dyke take up his settlement, not the settlement of the Miami Land and Improvement Company. Mr. Van Dyke cannot acquire by purchase or otherwise the settlement or occupancy of the Miami Land and Improvement Company, which was under the mineral law, and claim such settlement as a part of his settlement under the homestead law, as will hereafter appear. The Use Book, a manual for users of national forests, issued by the Secretary of Agriculture, July 1, 1913, pages 63 and 64, and The Use Book, 1908, on page 290, Section 14, approved September 7, 1906, provides:

> "This act does not authorize any settlement within a national forest except upon lands which have been opened for settlement under its provisions." Again,
>
> "The Secretary of the Interior by letter dated January 12, 1910, ruled that the provis-

> ions of Section 1 of the Act of June 11, 1906, which allows settlers credit for residence on lands covered by their interest, has reference to settlements initiated prior to the date of the act only, and that residence under permit issued by the Forest Service prior to the opening of the lands to settlement in the manner prescribed by the act is not occupancy of land within the meaning of the homestead laws and will not be credited as a part of the residential period to secure patent."

Mr. Van Dyke was advised by the Department of Agriculture, Forest Service (R., pp. 88-89, Ex. "E", f. 181-182), that Section 30 was covered by homestead entry, No. 1654, of F. S. Toombs made May 21, 1908. He filed an amended application on July 26, 1909 (R., p. 88, Ex. "C", f. 180) and on August 10, 1909 (R., p. 90, f. 184), was advised that the homestead entry No. 1654 had been vacated. It would appear that Mr. Van Dyke never acquired any rights by his applications above referred to. They were never acted upon by any department, but to the contrary were denied on November 2, 1909 (R., p. 104, Ex. "O", f. 214). The act of June 11, 1906, only permits preferential rights to settlers actually occupying and in good faith claiming such lands for agricultural purposes, not for mining purposes, prior to January 1, 1906. The provision of said act of June 11, 1906, is as follows:

> "Provided, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person,

if qualified to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry." (R., p. 86, f. 174).

Section 5 of the Act of June 11, 1906 (34 Stats. at L. 233), provides as follows:

"Sec. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this act, or to in anyway impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve."

Mr. Van Dyke has never yet claimed to have been a settler prior to the establishing of the Crook National Forest. He was on the premises only by virtue of the mining claims and was looking after the interests of the Miami Land and Improvement Company (R., p. 50, f. 97), not any interest of his own. Mr. Van Dyke declared under oath while a witness on the trial of this case, as follows:

"It is a fact that about midnight on the 22nd day of December, 1909, I took up my residence in the house testified to." (R., p. 48, f. 94).

And as late as December 15, 1909, Mr. Van Dyke was upon the mining claims looking after the interests of the Miami Land and Improvement Company (R.,

p. 50, f. 96-98), and he continued to testify as follows:

> "At the time when I talked to Mr. Swift (July 26, 1909) there were mining claims over a portion of these lands. They covered the right of way and where the house is. It is a fact that at that time they belonged to the Miami Land and Improvement Company as mining claims; they had title to it." (R., p. 49, f. 96). "I took an option on the mining claims in September, 1908. The terms of agreement extended over a period of a year". (R., p. 49, f. 96). "I have never received a deed from them. Yes, I have now as I remember. It was on the 16th day of December, along about that time, December, 1909, the 16th. That was after the railroad had been constructed across these mining claims. At the time I had this conversation with Mr. Swift I had this option on these claims. After the option I held possession under these mining claims. I did, yes. Along in November, 1909, there was no change. Just the same condition. I was holding possession under these mining claims when I put my tent there on the 15th day of December; and was holding possession under those mining claims when I put the lumber there to build my house. These I presume for the Miami Land and Improvement Company. I was looking after their interests. I hadn't received title yet." (R., pp. 49-50, f. 96-97).

The Court did find "That such actual occupancy by the said Cleve W. Van Dyke was made while the lands were yet in the Crook National Forest and while the same were held and claimed by the said Miami Land

and Improvement Company'' (R., Finding 10, pp. 21-22, f. 40). This is the occupancy of the Miami Land and Improvement Company, not of Mr. Van Dyke. He had neither title nor authority upon which to base or to initiate an occupancy or settlement. He absolutely received no permission to enter the said Crook National Forest except by virtue of the mining claims, as Mr. T. T. Swift, Forest Supervisor and officer of the Federal Government, who without any interest in the case, testified as follows:

> ''I did not at any time offer to give Mr. Van Dyke a special-use permit to occupy any portion of that ground. I did not grant Mr. Van Dyke a special use permit to occupy this ground. Such as he testified to. I did not give Mr. Van Dyke a verbal special use permit to occupy the land involved in this litigation, and did not give him one in writing''. R., pp. 50-51, f. 99-100). ''I don't issue verbal use permits.'' ''They are all a matter of record.'' (R., p. 51, f. 101).

This is a flat, unqualified denial by an officer of the Federal Government who has no interest in this litigation, that he never issued a special use permit to Mr. Van Dyke, verbally or otherwise, to enter said premises and to use and occupy the same, as it would appear that at the time of this conversation the premises were covered by mining claims and Mr. Van Dyke was looking after the interests of the owners of the mining claims.

8. Plaintiffs in error, on page 27 of their Brief set out:

"Construction of the Railroad, Injunction, and Right of Way Agreement."

Just what this alleged injunction has to do with this litigation, the record has absolutely failed to disclose. It appears from Mr. Jones' testimony that it covered more territory than is involved in this litigation (R., p. 40, f. 76). We submit that the record of this injunction would have been the best evidence as to the premises in dispute at that time. At any rate, Mr. Jones says: "The injunction, I think, referred to track laying." (R., p. 41, f. 79). It appears, however, that the premises in dispute were covered by the injunction. It is an admitted fact, however, from the record, that at the time the injunction was issued, if any was ever issued, the premises were being held by the Miami Land and Improvement Company and not Mr. Van Dyke. Mr. Van Dyke absolutely does not appear from the record to have had any interest or any other connection with the execution of the agreement of September 27, 1909, under which the railroad company entered upon the mining claims in dispute, nor with the alleged injunction. The deed itself discloses that Mr. Van Dyke had no interest in the controversy. It is true that he testified, through his efforts, the agreement or deed was entered into. If this be true, he was then looking after the interests of the Miami Land and Improvement Company, the owner of the premises, and not his own interest as a homesteader.

9. Plaintiffs in error, on page 28 state:

"Restoration of the Land to Settlement and Entry and Van Dyke's Status" (Continued)".

The Executive Order of August 27, 1909, provides:

> "Under authority of the Act of Congress, approved June 4, 1897, (30 Stats. 34-36) AND ON THE RECOMMENDATION OF THE SECRETARY OF AGRICULTURE, it is hereby ordered that the proclamation of July 1, 1908, establishing Crook National Forest, be modified **** The lands hereby excluded from the Crook National Forest which are not embraced in any other withdrawal, reservation or appropriation shall be restored to the public domain and become subject to settlement under the general provisions of the homestead laws, on such date and after such notice by publication as the Secretary of the Interior may prescribe." (R., pp. 80-81, f. 164-165).

This proclamation shows upon its face that the elimination was not made upon the application of Mr. Van Dyke. His application of July 26, 1909 (R., p. 88, Ex. "C", f. 180) for the S. E. ¼ of Section 30, was denied, (R., pp. 88-89, Ex. "E", f. 181-182). The forest services states, (Letter without date).

> "Local Land Office reports that the N. W. ¼ S. E. ¼ of Section 30, Township 1 N., R. 15 E., is covered by H. E. 1654 of F. S. Toombs, made May 21, 1908; it is therefore not subject to application under the act of June 11, 1906, and your application must be concelled to that extent."

The premises in dispute is the N. W. ¼ of the S. E. ¼ of Section 30. This shows that not only were the

premises claimed by the Miami Land and Improvement Company as mining claims but were also claimed by F. L. Toombs for homestead purposes. As long as these two rights continued in force, it would be impossible for Mr. Van Dyke to initate a settlement or occupancy of the premises. On August 10, 1909, (R., p. 90, Ex. "F", f. 184,), Mr. Van Dyke was notified that the homestead entry, No. 1654, was vacated. Therefore, if he ever filed an application to have the land examined and listed under the act of June 11, 1906, he certainly filed it after this date, and his attempt to initiate a right on his pretended application of July 26, 1909, cannot be considered, not only for the reason that the premises were included within a national forest, but was at the same time claimed by other persons.

10. Plaintiffs in error, on pages 44 and 45 of their brief give in part a Communication Addressed to the Secretary of Agriculture under date of June 8, 1910, and the instructions of September 19, 1913. Each were issued after the rights of all parties attached. This communication relates to a special case and a particular forest reserve and the President's proclamation eliminating the same is not set forth. Therefore, we cannot state the terms and conditions under which the same were eliminated from the forest reserve and the conditions of settlement. The instructions of September 19, 1913, on pages 45 and 46 of appellant's brief, contain the following:

> "Upon the applications of persons who were in possession of the lands under special-use permits issued by his department prior to said elimination" ****
>
> "If, as represented, portions of the lands

included within the elimination from the forest by the President's proclamation had prior thereto been listed by the Secretary of Agriculture for restoration under the act of June 11, 1906, upon the application of any qualified homesteader, the preference right secured to such applicant, and the preference right secured to those having settled upon the land prior to January 1, 1906, where such settlement has since been maintained, is not terminated and defeated by the elimination under the President's proclamation". ***

"In this connection your office should carefully investigate the question as to what particular tracts within this eliminated area were in fact listed by the Secretary of Agriculture under the Act of June 11, 1906, upon the application of an individual, and the register and receiver should be directed, in ADDITION TO THE PUBLISHED NOTICE, TO SPECIALLY NOTIFY SUCH APPLICANTS OF THEIR PREFERENTIAL RIGHT OF ENTRY WITHIN THE PERIOD NAMED, at the address shown by the records."*****

This appears to be based upon all settlements made prior to January 1, 1906, except where the department eliminates certain lands from the Forest Reserve upon Special Conditions or instructions. It will be noted that these instructions required personal notice to the persons claiming a preferential right of entry and gives them sixty days within which to make their filing. Certainly it cannot be consistently contended by counsel for plaintiffs in error, that Mr. Van Dyke had a preferential right and did not receive personal notice as

required by the above instruction. If Mr. Van Dyke had received personal notice, that would have been the first evidence introduced in the record. He absolutely had nothing upon which to base a preferentnal right. He did not even have a permit, verbal or otherwise, to enter this forest reserve, and he only entered upon the same by reason of the mining locations to which he had no title, and never acquired any, because the land was thrown open as public domain and for agricultural settlement prior to his receiving title to the premises, if he ever received title.

11. Plaintiffs in error, on page 29 of their brief, attempt, for the first time in the history of this litigation, to have this Court to consider the date "December 22, 1909", as error. Counsel for plaintiffs prepared on the trial Findings of Fact reciting this date. They heard the testimony of their client at the trial court when he gave this date of settlement. They prepared the bill of exceptions on appeal from the Superior Court of Gila County to the Supreme Court of the State of Arizona, setting forth the evidence and gave the date correctly, to wit, December 22, 1909. On motion of counsel for plaintiffs in error, the trial court examined, approved, allowed and settled appellants' bill of exceptions (R., p. 52, f. 102). The bill of exceptions were, however, corrected and examined before they were finally allowed by the trial court (R., p. 52, f. 102-103). The Supreme Court of Arizona passed upon the same record. The correct date is as testified to by Mr. Van Dyke, to wit, December 22, 1909. This date is important and it is not an error as claimed by plaintiffs. The photograph copy of the affidavit referred to in plaintiffs brief on page 30, was not attached nor served upon defendant, and we care not what the affidavit contains.

We are concerned with Mr. Van Dyke's testimony at the trial as stated in the record. It is appellee's contention that the date is not error but is the true date and fact, testified to in open court under oath by Mr. Van Dyke and on cross-examination, and this is true notwithstanding any statement that may be in the affidavit referred to by counsel for plaintiffs in error. The date in the affidavit is an error if it is "November 22, 1909". The bill of exceptions made by plaintiffs in error to this court is correct as to the date "December 22, 1909", and gives this date just as it was testified to by Mr. Van Dyke. The assignments of error to this court contain the same date, to wit, December 22, 1909 (R., pp. 121-127, f. 257-269-263-264-265), and allowed with "December 22, 1909," as correct date (R., p. 128 f. 269). If his testimony has been "bungled up", he alone must share the responsibility. It was his testimony that led to the conslusion that his settlement began for the first time at midnight on December 22, 1909. He testified that when he put the tent on the land he was looking after the interests of the Miami Land and Improvement Company and that was on the 15th day of December, 1909.

Plaintiffs in error, in their cross-complaint, allege: "That since the said 22nd day of December, 1909, the the said Cleve W. Van Dyke has been the owner, and entitled to the possession and in possession and occupancy of said S. E. ¼ of Section 30" (R., p. 18, f. 34). The trial court and the Supreme Court of Arizona accepted Mr. Van Dyke's statement that his settlement began at midnight on the 22nd day of December, 1909; that he went off of the premises and on again in order to create a homestead settlement and be within the law of June 11, 1906, as prior to that date he had made no

homesteaded settlement on the premises, as prior to that time he was occupying the premises at the request of the Miami Land and Improvement Company, then owner, and the Forest Supervisor, Mr. Swift, had refused to grant him a permit, either verbal or written, to occupy said premises. The decision of the Supreme Court of Arizona, whether unanimously or not, is the law of this case until reversed, and the dissenting opinion is not the law of the case. The Supreme Court said:

> "The land, in fact, was held by his predecessor and himself until midnight December 22, 1909, as a mineral claim at which time he went off of the land and immediately returned and established a homestead residence; this homestead right, which was finally perfected into a patent, was initiated then on the 22nd day of December, 1909, and not before. He can claim no interest in the land by reason of a a mineral location, for that had been abandoned and he had no interest in the land as a homesteader at the time appellee constructed its road" (R., p. 111, f. 230).

12. Plaintiffs in error, on page 33 states:

> "Railroad Company's Amended Application for Right of Way."

The railroad company first surveyed its line of right of way over the premises in question in November and December, 1908 (R., p. 37, f. 70).

> Appellee, "Did during the months of August and September, 1909, complete the construction of its said railroad over and across

said premises as staked and marked on the ground and on the line of said amended survey." (R., p. 21, Finding 4).

"And in the months of November and December, 1908, plaintiff marked and staked its said line of railroad and right of way on the ground along the entire length of said premises described in plaintiff's complaint filed herein, to extend 100 feet on each side of said center line as provided for by said act of Congress." (R., Finding 4, p. 20, f. 38-39).

Even if the survey was not made until between January 2, 1909, and June 22, 1909, as shown by the affidavit of Mr. McClure, attached to the map, under the act of Congress of March 3, 1875, Section 4 thereof, which provides:

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land offices for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The amended survey was made and the center line staked on the ground in November and December, 1908,

and was approved by the directors of the railroad company on December 16, 1909, and filed with the local land office at Phoenix, Arizona, on December 30, 1909. This would be within twelve months as provided by Section 4 of the above Act of Congress, for the reason that the right of way in question was over surveyed lands. Mr. Jones testified as follows:

> "The company first began construction of this part of the road shown by these maps in April, 1909; this section of the road is between nine and ten miles and it was completed in September, 1909". (R., p. 40, f. 76). "The work of laying track was begun on the ground in controversy in the first part of October, 1909. Most of the work was done in August." (R., p. 40, f. 77). "In the first part of October, 1909, it was completed sufficiently to get trains over it." (R., p. 39, f. 73). The injunction, I think, referred to track laying". (R., p. 41, f. 79).

Mr. Van Dyke, when he acquired the deed of December 16, 1909, from the Miami Land and Improvement Company for mineral rights, had no "peace" to purchase from the mining claimants, for the reason that the Government had determined that the land was more valuable for agricultural purposes than mineral and the same was thrown opon under the proclamation of August 27, 1909, for occupancy and settlement under the homestead laws, at which time the defendant in error was in possession and had constructed its road across the said premises.

13. Plaintiffs in error, in their brief on page 34 set out:

"The Railroad Company Made no Claim to Right of Way in Excess of the Widths Specified in the Right of Way Agreement."

The construction of the road gave notice to all claimants, and the act of Congress fixed the extent of the grant to 100 feet on each side of the center line. Mr. Van Dyke was not a party to the deed or agreement of September 27, 1909 (R., pp. 98-102, f. 203-210). He was neither an officer, director, stockholder, or otherwise connected with the grantee of that deed or agreement so far as the record discloses. He only had an option on the mining claims which was never introduced in evidence, and on December 15, 1909, he was still looking after the interest of the Miami Land and Improvement Company (R., p. 50, f. 97). This was an instrument between the owner of the mining claims, who held possession of the premises, and the railroad company who desired to cross the premises. After it had acquired permission to enter and construct its road within the forest reserve, the railroad company then acquired the right from the Miami Land and Improvement Company, to cross their claims, and when the grantor's rights become extinguished by reason of the proclamation of August 27, 1909, declaring the land was more valuable for agricultural purposes than mining, the premises then became, ipso facto, public domain of the United States and the railroad grant took effect immediately under the act of March 3, 1875, by reason of actual construction of its road on the premises, to the extent of 100 feet on each side of said center line, which center line had been staked on the ground with all stakes necessary to complete construction. Therefore, both the trial court and the Supreme Court of the State of Arizona would naturally conclude that the

defendant in error having marked out the center line would be entitled, as a matter of law under said Act of Congress, to 100 feet on each side thereof, and whether the exterior boundaries of this right of way were or were not marked and staked so as to notify the plaintiffs in error, or any one else, is of no concern of the plaintiffs or any one else, as this is a matter between the railroad company and the government. A right once acquired under a grant from the Government for a railroad purpose cannot be lost by occupation and use of other parties, as will hereafter appear. The defendant in error did not, however, place its property line stakes until in the early part of 1911, about 12 to 15 months after Van Dyke made his homestead entry on December 22, 1909. The act of Congress does not provide within what time this shall be performed, or if at all. Plaintiffs in error removed the property line stakes and this litigation followed (R., p. 44, f. 84).

III.

Actual facts as found by the trial court and the Supreme Court of Arizona, and the evidence supporting the same.

1. Appellee is a railroad corporation and succeeded to all of the rights, property, franchises, right of way and all of the assets of the Gila Valley, Globe & Northern Railway Company.

2. At the time of construction of the Globe and Miami Extension of nine or ten miles, the Arizona Eastern Railroad Company had the right, power and authority to construct said line.

3. In March, 1906, the line from Globe to Miami was surveyed under the Act of Congress, approved

March 3, 1875. This was prior to the incorporating of Section 30 within the forest reserve.

4. On January 13, 1908, Section 30 was included for the first time within the Tonto National Forest Reserve. On July 1, 1908, the same was incorporated into the Crook National Forest Reserve.

5. On October 1, 1896, a copy of the articles of incorporation and proofs of organization were filed with the Secretary of the Interior (Par. II, R., p. 2). This is admitted by the answer and on page 13 of the brief of plaintiffs in error. The Act of March 3, 1875, does not require amended articles of incorporation to be so filed, and proof of organization again to be made.

6. On November 5, 1908, appellee filed its map or profile of its survey of March, 1906, in the local land office, at Phoenix, Arizona, which was approved September 21, 1909, by the Assistant Secretary of the Interior, and posted September 30, 1909, (See photograph copy of map and dates of filing and approval by the Forest Department and Interior Department, f. 161a-161b).

7. In November and December, 1908, an amended survey was made upon the ground (R., p. 37, f. 70) and the center line was staked. The slope stakes were in and the finishing grade stakes, in fact, all stakes necessary to completion (R., p. 40, f. 77) were over the premises in dispute, and it was never changed (R., p. 37, f. 70). The road was constructed over the S. E. ¼ of Section 30 upon this right of way (R., p. 37, f. 70 to 76).

8. On April 16, 1909, written application with map of right of way to enter and construct said road within the Crook National Forest was made and filed with the

Department of Agriculture, Forest Service and acknowledged by that Department (R., p. 79, Ex. "4", f. 161).

9. On July 6, 1909, written permission and authority was granted as follows: (R., p. 80, f. 163).

"Phoenix 01501.

United States Department of Agriculture, Forest Service, District 3

Strickler-Luna Building,
Albuquerque, New Mexico, July 6, 1909.

"Crook, Use, Gila Valley, Globe & Northern Ry Co., Railroad (Interior), Nov. 5, 1908.

The Commissioner of the General Land Office,
Sir:

In reference to your letter F-RCM of April 16: The applicant having executed the stipulation required to protect National Forest interests, I have the honor to recommend that its application for a right of way be approved.

Very respectfully,
EARLE H. CLAPP
Acting District Forester

Received Jul- 12, 1909
C. L. O.

10. In April, 1909, appellee commenced construction of the road from Globe to Miami and it was entirely completed in September, 1909. This Section of the road is nine or ten miles (R., p. 40, f. 76).

11. In August, 1909, the grading was about completed over the premises in dispute (R., p. 38, f. 72-78).

Mr. Van Dyke admits it was completed in September, 1909 (R., p. 46, f. 89).

12. BY THE FIRST OF OCTOBER, 1909, the road was completed so as to operate trains over the same (R., p. 39, f. 73).

13. On September 27, 1909, and prior thereto, the Miami Land and Improvement Company, a corporation, owned the premises in dispute under mining claims and held possession of the same thereunder (R., p. 49, f. 96).

14. On September 27, 1909, the railroad company acquired, in writing, permission from the Miami Land and Improvement Company to enter and construct its road over its mining claims and not from Mr. Van Dyke. The permission from the mining claim owners was obtained after permission to enter the forest reserve.

Mr. Van Dyke testified:

> "It is a fact that on September 27, 1909, prior thereto and on that date, that the Miami Land and Improvement Company claimed title to this land in controversy" (R., p. 49, f. 96). "I was holding possession under these mining claims when I put my tent there on the 15th day of December, and was holding possession under the mining claims when I put the lumber there to build my house. These I presume for the Miami Land and Improvement Company. I was looking after their interest. I hadn't received title yet." (R., p. 50, f. 97).

15. Mr. Van Dyke never at any time or at all, acquired or received a special-use permit, verbal or written, from any person connected with the Govern-

ment to enter the premises in dispute while the same were within the national forest reserve.

> Mr. Van Dyke testified: "I never at any time had a written permit from any Government Official to go upon the land. He never issued a written permit". (R., p. 47, f. 91).

Mr. Swift, Forest Supervisor of the premises in dispute, and a Government Official, a witness having no interest in the controversy, testified on the trial as follows:

> "I did not grant Mr. Van Dyke a special-use permit to occupy this ground, such as he testified to. I did not give Mr. Van Dyke a verbal special-use permit to occupy the land involved in this litigation, and did not give him one in writing" (R., p. 51, f. 100). "I don't issue verbal permits. They are all a matter of record." (R., p. 51, f. 101).

Mr. Van Dyke further testified: "A verbal permit was granted on July 26, 1909, in Mr. Swift's office at Safford, Arizona," (R., p. 47, f. 91). Mr. Van Dyke further testified: "He then made out on the typewriter the amended application which I signed" (R., p. 47, f. 91). If this was the fact, why did Mr. Van Dyke, on the same date, at Globe, Arizona, July 26, 1909, make application as set forth in R., p. 88, Exhibit "C", f. 180, and why his letter of August 30, 1909, to Chas. E. Arnold, Receiver, at Phoenix, Arizona, (R., p. 91, f. 186-187, Ex. "H"), and why his letter of August 6, 1909, answered by Exhibit "F", R., p. 90, f. 184, and his letter of August 30, answered September 17, 1909, as shown by

R., pp. 90-91, Ex. "G", f. 185-186, and the final letter of November 2, 1909 (R., p. 104, f. 214, Ex. "O").

16. On June 5, 1909 (R., p. 84, f. 171, Ex. "B"), Mr. Van Dyke made application for examining and listing under the act of June 11, 1906, certain lands and he expressly excepted certain portions covered by St. John Mineral Entry, Section 30, Township 1 N., Range 15 E., and in answer to this inquiry he received the rules and regulations under which settlements under the act of June 11, 1906, could be made. Rules and Regulations 1 and 3, of Exhibit "B", R., p. 85, f. 172, are as follows:

> "1. Applications must be made upon this form, signed by the applicant, and mailed to the Forester, Washington, D. C."
>
> "3. The fact that an applicant has settled upon the land will not influence the decision with respect to its agricultural character. Settlement after January 1, 1906, and in advance of the opening by the Secretary of the Interior, IS NOT AUTHORIZED BY THE ACT, CONFERS NO RIGHTS, AND WILL BE CONSIDERED TRESPASS."

And Section 5 of the Act of June 11, 1906 (R., p. 87) prohibits just such settlements as Mr. Van Dyke was attempting to make.

17. Appellants, on page 39, No. 16, give November 21, 1909, as the true date of settlement, and appellants, on page 29 of their brief, attempt to have the Court consider the date of November 22nd, when in fact Mr. Van Dyke testified on the trial, on cross examination, as the true date as follows: "It is a fact that about

midnight on the 22nd day of December, 1909, I took up my residence in the house testified to (R., p. 48, f. 94). And when he put his tent there and the lumber to build his house, he was looking after the interests of the Miami Land and Improvement Company. This was on December 15, 1909.

18. On December 30, 1909, the railroad company filed its amended map of its constructed located line over the premises in question and within one year after survey thereof, as required by Section 4, Act of March 3, 1875, as the same was over surveyed lands. This map was approved by the Secretary of the Interior on March 4, 1911, took effect as of the date of construction to the extent of the grant under the act of Congress of March 3, 1875, to wit, 100 feet on each side of the center line. Mr. Van Dyke's homestead patent was issued February 19, 1912.

19. On December 15, 1909, Mr. Van Dyke was holding possession under the mining claims for the owner, Miami Land and Improvement Company, and when he put his tent there and the lumber for his house he was still looking after the interests of the Miami Land and Improvement Company (R., p. 50, f. 97) and not after his interests as a homesteader, and, under his own testimony and in order to make a legitimate and lawful entry on the land in question under the act of June 11, 1909, he was compelled to and did make the same at midnight on the 22nd day of December, 1909, as testified to by him, as under the rules and regulations 1 and 3, hereinbefore set forth, and section 5 of the act of June 11, 1906, this was the first possible date he could make an entry and settlement.

20. On July 26, 1909, the premises in question

belonged to the Miami Land and Improvement Company. It had title to the premises, and not Mr. Van Dyke (R., p. 49, f. 96).

21. December 22nd, 1909, at midnight, Mr. Van Dyke took up his residence on the premises in question and made his settlement for the first time, under the act of June 11, 1906, and regulations thereunder (R., p. 48, f. 94), which was long after the railroad was constructed and in operation.

22. July 26, 1909, Mr. Van Dyke's application for examination and listing ***** N. W. ¼ of the S. E. ¼ of Section 30 (R., p. 88, Ex. "C", f. 180), and replying thereto (R., pp. 88-89, Ex. "E"), the department advised Mr. Van Dyke that the local land office reports the N. W. ¼ of the S. E. ¼ of Section 30 as covered by H. E. No. 1654 of F. S. Toombs, made May 21, 1908.

23. August 10, 1909, Mr. Van Dyke was further advised about the N. W. ¼ of the S. E. ¼ of Section 30 (R., p. 90, f. 184).

24. Plaintiffs in error, in their cross-complaint, allege: "That since the said 22nd day of December, 1909, the said Cleve W. Van Dyke has been the owner and entitled to the possession and occupancy of said S. E. ¼ of Section 30" (R., p. 18, f. 34).

IV.

We will take appellants "Specifications of Error Relied Upon", on page 39 of their brief, in the order they appear.

Specifications I, II, and III. are considered together:

There is nothing in the record that would even in-

dicate that Mr. Van Dyke was the moving cause in procuring the Executive Order of August 27, 1909. The General Excutive Order excludes from the Crook National Forest Section 30 upon the recommendation of the Secretary of Agriculture (R., pp. 80-81, f. 164, Ex. "6"). Mr. Van Dyke's application for segregation and elimination of June 6, 1909, and his application of July 26, 1909, and his pretended preferential claim for a homestead for that reason were met by Rules and Regulations 1 and 3 (R., p. 85, f. 172, Ex. "B") under I. of this brief, and Section 5 of the Act of June 11, 1906. Under said Rule 3 and Section 5, Mr. Van Dyke was required to be a settler upon the premises prior to January 1, 1906, in advance of opening by the Secretary of Interior, and settlement subsequent to that date was not authorized, conferred no rights, and were considered trespass. If Mr. Van Dyke has a preferential right under the Act of June 11, 1906, he would have received the notice required on page 47 of his brief.

In Robert G. McDougall, 43 L. D. 186, cited on page 49 of appellants' brief, the court says:

> "One who applied *** under the act of June 11, 1906, and is thereafter granted a special use permit to occupy the land is entitled, in submitting proof *** to credit for residence since the date of the special use permit."

In this entry, above referred to, the land department was considering the act of May 14, 1880, and the proceeding is a special one and it may be that the proclamation eliminating the same was a special order and not a General Order such as the proclamation of August 27, 1909, under the act of June 11, 1906. Mr. Van Dyke testified that he never at any time had a

written permit from any government officials to go upon the land; that they never issued him a written permit (R., p. 47, f. 91). Mr. Swift testified: "I did not grant Mr. Van Dyke a special-use permit to occupy this ground, such as he testified to. I did not give Mr. Van Dyke a verbal special-use permit to occupy the land involved in this litigation, and did not give him one in writing" (R., p. 51, f. 100). "I don't issue verbal permits: They are all a matter of record" (R., p. 51, f. 101).

SPECIFICATION IV.

Mr. Van Dyke, under his own testimony, never became a settler under the homestead laws until midnight on December 22, 1909 R., p. 48, f. 94). Under Rule 3 (R., p. 85, f. 172) and Section 5 of the act of June 11, 1906 (R., p. 87, f. 176), Mr. Van Dyke was prohibited from making settlement prior to this date and his own testimony shows that down to the 15th day of December, 1909, he was still in possession under the mining claims for the Miami Land and Improvement Company, a corporation, the then owner of the premises (R., p. 50, f. 97).

SPECIFICATION V.

A third party cannot take it upon himself to enforce conditions attached to a grant when the government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the government has been treated with respect to the property.

Walsh vs. Columbus, H. V. & A. R. Co., 176 U. S. 469.

The question whether a corporation, having ca-

pacity to purchase and hold real estate for certain definite purposes or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly, or by necessary implication authorizing them to do so. In other words, Mr. Van Dyke cannot be heard to complain of the Secretary's grant to appellee of this right of way, even though in his opinion the railroad company has no charter power to receive the same.

SPECIFICATION VI.

If the lands were "especially reserved from sale", under the act of 1875, until December 22, 1909, as stated by appellants, then the same were "especially reserved from sale", under the act of June 11, 1906 and the rules and regulations heretofore cited (I. of this brief until December 22, 1909, unless the settlement was prior to January 1, 1906, as Section 5 of the act of June 11, 1906, does not authorize any future settlements after January 1, 1906, on any land within forest reserves.

SPECIFICATION VII. AND VIII.

The railroad company applied April 16, 1909, as shown by the reply from the Forest Service of April 19, 1909 (R., p. 79, Ex. "4", f. 161) for permission to enter the Crook National Forest for the purpose of building its railroad through said reservation and enclosed a map of its right of way. On July 6, 1909, the Forest Service replied to the railroad company's letter of April 16, 1909, and granted the permission (R., p. 80, f. 163, Ex. "5"). The application was made and the

map submitted and the same was granted after the amended survey in November and December, 1908, and after the center line was staked and all other stakes necessary were set (R., p. 40, f. 77). The Government is the only party who could question the right of the railroad company to enter a national forest reserve. In other words, if a railroad company should enter a national forest reserve without permission and construct its road the Government would be the only party that could complain of the wrongful entry or trespass, if the same should be considered such, as the wrongful act of the trespasser, if any, would be against the government and not against an individual for so entering a forest reserve.

SPECIFICATION IX.

The statement by plaintiffs in error, under this specification is an admission that Van Dyke appropriated the land by homestead settlement on December 22, 1909. This bears out Mr. Van Dyke's testimony that he took up his residence on the land at midnight on December 22, 1909 at which time and prior thereto the railroad company had constructed its said road and was operating its trains thereon.

SPECIFICATION X.

The approval of said map by the Secretary of the Interior was equivalent to a patent to the railroad for its right of way over the premises from the date of construction of its road. The homesteader could not complain if the railroad company had never filed a map with the local land office showing the definite location of its right of way. Actual construction of the road is certain and unmistakable evidence and notice of appropriation, and this Honorable Court has

held that the approval of such map is sufficient authority to enter the reservation, provided the railroad company complied with the conditions imposed upon such approval.

Chicago, M. & St. P. R. Co. vs. U. S., 244 U. S. 351.

Under this record and the proceedings, the soundness of the assumption is impregnable that the Secretary of the Interior acted in this matter under the law and not contrary thereto.

V.

Replying to Appellants' "Points of Law and Authorities" on page 14 of their brief, we will consider the same in the order they appear.

I. The proclamation of August 27, 1909, eliminating Section 30 from the National Forest, was a GENERAL EXECUTIVE ORDER on recommendation of the Secretary of Agriculture (R., pp. 80-81, f. 164-165, Ex. "5") and no preferential rights were recognized unless settlement was made prior to January 1, 1906, as a settlement after that date and in advance of opening by the Secretary of the Interior were not authorized, conferred no rights and were considered trespass. (R., p. 85, f. 172, Rule 3, Ex. "B" and Sec. 5 of the Act). The quotation of Paragraph 4 of the Regulation of the Department of Agriculture, on page 43 of Appellants' Brief, refers to settlement made prior to January 1, 1906. At the close of page 43 of same brief and continuing on page 44, they say: "Otherwise, it would be in the power of the executive to wholly frustrate the operation of the Act of 1906 by eliminating in every case by Executive Order under its general power". This is just what the Executive Order of August 27,

1909, meant to do, as Mr. Van Dyke testified that on September 27, 1909, and prior thereto, and on that date, the Miami Land and Improvement Company claimed the right to this land in controversy (R., p. 49, f. 96) and the same belonged to the Miami Land and Improvement Company as mining claims when Mr. Van Dyke talked to Mr. Swift, and Mr. Van Dyke was holding possession under the mining claims owned by the Miami Land and Improvement Company when he put up his tent on December 15, 1909, while he was then looking after the interests of the Miami Land and Improvement Company (R., p. 50, f. 97). The facts in the case do not bring Mr. Van Dyke under the Communication addressed to the Secretary of Agriculture on June 8, 1910, on page 44 of appellants' brief, neither will the facts place Mr. Van Dyke under the Instructions of September 19, 1913, on pages 45 and 46 of their brief, for the reasen Mr. Van Dyke was not a settler prior to January 1, 1906, and never obtained a special use permit to occupy the premises while the same were within the Forest Reserve, as shown by Mr. Van Dyke's testimony (R., p. 47, f. 91), and the testimony of Mr. Swift, Forest Supervisor, (R., p. 51, f. 100). The trial court by virtue of its findings and judgment held that Mr. Van Dyke never at any time made a homestead settlement on the premises prior to December 22, 1909 (R., p. 22, Finding 12, and also conclusion of law by court p. 22, f. 42, conclusion 1). This date is admitted by plaintiffs in error on page 41, IX. of their brief. The court found that at the time appellee entered upon said premises and constructed its said road, said premises were held under mining locations and were owned and held by the Miami Land and Improvement Company, and not by Mr. Van Dyke, or either of the appellants (R., p. 22, Finding 11). The trial court found

that the land controversy was regularly located as mineral land and held as such until the middle of November, 1909, by a corporation known as the Miami Land and Improvement Company (R., p. 21, Finding 5).

II. At the top of page 49 of appellants' brief they state: "To be sure, in his affidavit filed with his homestead application, Van Dyke inserted November 22, 1909, as the date of his settlement on the land," and as a witness for himself on the trial he testified as to the true date of such settlement, to wit, at midnight on December 22nd, 1909, he took up his residence on the land (R., p. 49, f. 97). This last statement was made by the party in interest on cross-examination at the trial, the statement in the affidavit was an ex parte statement.

On page 41, IX, of the brief, Mr. Van Dyke claims his settlement on December 22, 1909. The trial court and the Supreme Court of the State of Arizona each took the true date of settlement, to wit, December 22, 1909, at midnight, as the date Mr. Van Dyke for the first time made his homestead entry and settlement. We repeat, by saying that Mr. Van Dyke did not come within the rule in the case of Robert McDougall, 43 L. D. 186, cited on Page 49 of his brief, for the reason he was not on the premises prior to January 1, 1906, and he never at any time thereafter received a special use permit to occupy the same so as to entitle him to a residence from the date of a special use permit. Mr. Van Dyke seems to have had two dates of settlement, one when he was dealing with the Government for the purpose of obtaining a patent to the premises, and the other when he attempts to defeat the rights of the railroad company by a settlement which he claims to have initiated without any permission or authority from the

government. The Act of May 14, 1880, appears to be a special act and not a general act, such as that of June 11, 1906.

The case of J. Paul Holden, 43 L. D. 525, cited on page 50 of appellants' brief, was considering the withdrawal and elimination under the special act of February 28, 1911, and has no application to the act of June 11, 1906.

III. This point will be considered generally with all others.

IV. No alleged option is in the record, and Mr. Van Dyke states mere conclusions of what the instrument purports to contain and attempts to construe an instrument, in writing, that is neither introduced or its loss accounted for, if the same ever existed. Mr. Van Dyke persistently testified that he was holding possession of the mining claims for the Miami Land and Improvement Company, the owner, down to December 15, 1909 (R., p. 50, f. 97). Mr. Van Dyke claims to have taken a deed to the premises on December 16, 1909, after the railroad was constructed across the same; after the same had been declared open for agricultural settlement under the homestead law, and the land reclassified as agricultural, its mineral character being then destroyed, if this be true, then he acquired no interest or right by virtue of this deed at that late date, and no "peace" existed to be purchased.

Points V, VI, VII, VIII, IX and X, together with others heretofore noted, will be considered by appellee in its brief.

VI.

Appellee contends that plaintiffs in error have no

assignments of error and, if so, they do not meet the requirements of Section 997 of Revised Statutes, and are not specified according to Rule 21 of this Court.

The Brief of plaintiffs in error, on page 39, filed in this Court, contains no specification of error such as required by Rule 21. If the propositions referred to on page 39 of their brief, are to be regarded as attempted specifications of error, they wholly fail to meet the requirements of the rule. There is no reference to the pages of the records where the ruling complained of can be found. There are no rulings of the Court specified as error. No specifications of error as to the judgment. No specifications of error as to the findings. No specifications of error as to the Court's refusal to make findings requested by plaintiff in error. No specifications of error of the refusal of the court to grant a rehearing.

As to the assignments of error, the rejected evidence is not quoted. The names of the witnesses are not given. There is no reference to the page of the record where the rulings complained of can be found. Where such is the case, the error, if such, will be disregarded.

Portland Co. vs. U. S., 15 Wall. 1.

Benites vs. Hampton, 123 U. S. 519.

Error should be specified with precision, without making it necessary to search through the entire evidence in the record. There is no means of ascertaining the particular ruling of which the plaintiffs in error complain. We respectfully suggest that no duty rests upon the court or upon opposing counsel to make such investigations.

In the propositions announced on pages 39, 40 and 41 of their brief, as Specifications of Error, not a single adverse ruling of the court below is there specified, or a Specification of error predicated therein.

The specifications of error are mere propositions of law or statements made by counsel for plaintiffs in error as to what some department of the government should or should not have done, and the effect of the department's acts upon the alleged settlement of Mr. Van Dyke, and the Court is left to search the entire record in order to discover the alleged specifications of error or propositions of law without its attention being called to the ruling of the lower court, if any, made thereon.

VII.

Points of Law, Authorities and Argument of the Railroad Company.

(In order to shorten the record, we will use "Appellants" and "Appellee").

When the Secretary of the Interior approved appellee's application with map attached to enter the forest reserve, and the profiles filed with him, that approval was, in effect, a decision by the Secretary of the Interior, that the appellee was a qualified grantee under the Acts of Congress, approved March 3, 1875, and March 3, 1899, and was authority for appellee to enter the said forest reserve and construct its road over the said forest and the public lands of the United States from Globe to Miami, a distance of about nine or ten miles, under said acts, and this decision cannot now be questioned by a stranger or intermeddler.

It has always been held that the existence of land

subject to be patented was the only necessary pre-requisite to a valid patent.

Noble vs. Union River Logging R. Co. 147 U. S. 165.

Oregon Truck Line vs. Deschutes R. Co., 172 Fed. 738.

And the approval of the profile or map was sufficient authority and permission to enter.

Chicago, M. & S. P. Ry Co. vs. U. S., 244 U. S. 351.

Where the Secretary of the Interior has decided that a railroad company is entitled to a grant and has approved the map and profile presented in behalf of the company, it will be presumed that the preliminary steps necessary to such decision and approval have been taken.

Rierson vs. St. L. & S. F. R. Co., 51 Pac. 901.

The fact that the right of way, as shown on the original map, did not cross the premises in question, is immaterial, as the railroad company had a right to change the location of its road so as to pass over the premises in question; provided the change does not interfere with intervening rights.

Phoenix & Eastern R. Co. vs. Arizona Eastern R. Co., 9, Ariz. 434.

It cannot be claimed by one holding possession of land adversely that a corporation holding the real ownership had not the power to acquire the land under its charter. The State alone can question this right of a corporation to hold real estate.

Chicago & A. R. Co. vs. Keegan, 56 N. E. 1088.

In Bank vs. Whitney, 103 U. S. 99-103, which involves the validity of a mortgage to a national bank, to secure future advances made to the mortgagor, the right of the bank to enforce the mortgage was sustained upon the principle in Bank vs. Matthews, 98 U. S. 621. The Court said:

> "Whatever objection there may be as to the security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government."

In Van Wyck vs. Knevals, 106 U. S. 360, the Supreme Court says:

> "A third party cannot take it upon himself to enforce conditions attached to the grant when the government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the government has been treated with respect to the property."

Walsh vs. Columbus H. V. & A. R. Co., 176 U. S. 469.

The question whether a corporation, having capacity to purchase and hold real estate for certain definite purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter concerns only the State within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly

or by necessary implication which authorizes them to do so.

Fritts vs. Palmer, 132 U. S. 282;

Phelps vs. Moore, 100 U. S. 208;

Cowell vs. Springs Co., 100 U. S. 551;

Reynolds vs. Bank, 112 U. S. 405;

Blair vs. City of Chicago, 201 U. S. 400.

In Oregon Trunk Line vs. Deschutes R. Co., 172 Fed. on page 742, the court having under consideration the act of March 3, 1875, and the questions insisted on by defendant were:

> 1. "That the approval of plaintiff's maps by the Secretary of the Interior was invalid and passed no title, because the plaintiff, being a Nevada corporation, organized under a law which prohibited it from building or owning or operating a railroad in the state of its creation, cannot do so in Oregon, and, therefore, had no capacity to take the grant in question."
>
> 2. "That the survey of the land delineated on the plaintiff's maps as shown thereon was made prior to the filing of a copy of its articles of incorporation and due proof of organization with the Secretary of the Interior, and was not in compliance with the provisions of the act of 1875, and the Secretary had no power or authority to approve the map for that reason."

The Court, in construing this proposition, in part says:

"The defendant, however, is not in a position to raise any of these questions. It had no title or interest in the property at the time the map was approved which are affected thereby. It was a stranger to the proceedings and the title. The Secretary of the Interior had jurisdiction and authority to dispose of the public domain, and his approval of the plaintiff's map was equivalent to the issuance of a patent to the land, and cannot be challenged by one who is not in privity with the government, or who had not acquired a right to be preferred in the acquisition of the land before such an approval."

Mr. Justice McKenna, in Duluth & Iron Range R. Co. vs. Roy, 173 U. S., 587, says:

"To enable one to attack a patent from the Government, he must show that he himself is entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee."

"Persons not in privity with the Government in any respect when a patent was issued under the railroad land grant cannot attack such patent on the ground of fraud, error, or irregularity in the issuance of the patent."

Burke vs. Southern Pac. Ry. Co., 234 U. S. 667.

It is well to observe that this is not a suit by the Government to cancel and annul the grant to appellee for fraud practiced, if any, or for any fraudulent act,

error of law, or mistake committed by the department in issuing it.

Burke vs. S. P. R. Co., supra.

A person attempting to make a homestead entry cannot question the legal title of the railroad.

Hamblin vs. Western Land Co., 147 U. S. 531.

The patent or right of way issued to appellee under such circumstances may be irregularly issued, but, as it is the act of a legally constituted tribunal, and is done within its jurisdiction, it is not void, and, therefore, passes the title.

Burke vs. S. P. R. Co., supra;

Noble vs. Union River Logging Ry Co., supra;

McKenna U. S. Atherton, 160 Fed. 547.

Durango Land & Coal Co. vs. Evans, 80 Fed. 425.

VIII.

Appellants claim that appellee acquired no right by constructing its road over the land in controversy, for the reason the same were within the National Forest, and that the Act of 1875, did not apply to such lands. Appellants admit, however, that rights are acquired under the Act of March 3, 1875, by construction and the grant becomes fixed by such construction, though no map of definite location has been filed with the Secretary of the Interior, but contend that this does not apply to rights of way over lands within National Forest Reserves.

The Act of March 3, 1875, and the Act of March 3, 1899, are construed together. We contend that the

extent of our rights were acquired under the Act of March 3, 1875, and under this act we had the right to claim a strip 200 feet wide and to construct our road upon the premises in question, though within the National Forest Reserve, by complying with the Act of March 3, 1899, and the rules and regulations promulgated by the Secretary of the Interior under that act, which we did do. The Act of March 3, 1899, says: "That IN THE FORM PROVIDED BY EXISTING LAWS, the Secretary of the Interior may file and approve surveys of railroads within forest reserves", and the Rules and Regulations in the "Use Book", as set forth in this brief. (Under 1.).

The Supreme Court, in Chicago, M. & S. P. R. Co. vs. U. S., supra, says: "Congress has committed the solution of the right of the railroad to enter a "forest reserve to the Secretary of the Interior, if in his judgment the public interests will not be jeopardized."

On July 6, 1909, the Forest Service recommended the appellee's application of April 16, 1909, to enter the Crook National Forest over the premises in question be granted (R., pp. 79-80, Ex. "4" and "5"), and on September 21, 1909, and March 4, 1911, the Secretary of the Interior approved appellee's application to so enter. (Photograph maps of Record, f. 161a).

It will be presumed that the preliminary steps required by the above rules and regulations and all steps necessary to such decision and approval have been taken by appellee.

Rierson vs. St. Louis & S. F. Ry Co., 51 Pac. 901;

Noble vs. Union River Logging R. Co., supra.

The Supreme Court of Arizona in this case, says:

"In this case, inasmuch as the railroad company was granted a permit to enter upon the Crook National Forest Reserve and construct a road it must be assumed that it conformed with all the rules and regulations of the Department and that it was rightfully upon the reservation and constructed its roadbed and laid its rails across the land in dispute with the sanction and permission of the properly constituted authorities. The soundness of this assumption is impregnable when we take in connection with the permission to enter into the reservation the approval of the map of definite location by the Secretary of the Interior. We have been unable to discover any regulation requiring that the applicant for a right of way over a National forest should accompany it with a map and profile definitely fixing and placing the location of the right of way. The practice in the present case, of granting permisssion upon the original map and profile, is very strong and convincing proof that no such regulation existed at the time the permission was granted." (R., p. 109), 18 Arizona 220.

Appellants seem to rely on the case of Chicago, M. & S. P. Ry. Co. vs. U. S., 244 U. S. 351. The facts in this case and the one at bar are not the same, in this:

(a) In the above case the railroad company was granted, in writing, advance permission to construct its road through a forest reserve on the faith of a written promise from the Company to execute certain stipulations required by the Forest Service. Construc-

tion on this condition was about completed, when the Secretary of the Interior refused to approve the map for the reason the railroad company had refused to carry out its stipulations, and the government brought this action to prevent further construction and to compel the railroad company to enter into the promised stipulations.

(b) This action was between the Government and the railroad Company, wherein the Government was complaining of a trespass or wrong as against it, and in the case at bar appellants have no right or authority to raise such a question, as the entrance into a forest reserve may be unlawful as against the United States; yet, it would not violate any rights of the appellants by virtue of entering without permission from the Government. In the case at bar the government is not complaining, but, on the other hand, consented to the entry and construction of the railroad over the forest reserve.

(c) A homesteader could not complain of a railroad company entering a forest reserve without authority from the government to so enter. A homesteader can only complain when his rights are invaded by entering his settlement without his permission and not by reason of an entry, without permission, into or upon a forest reserve.

In Chicago, M. & St. P. R. Co. vs. U. S., supra, a bill was filed by the U. S. to enjoin the railroad company from constructing or operating its railroad through a national forest, unless it executed a stipulation required by the Secretary of the Interior.

Mr. Van Dyke could not maintain an action for an injunction against this appellee to enjoin it from en-

tering or constructing its railroad through the Crook National Forest Reserve until it had complied with the act of March 3, 1899, or executed a stipulation required thereunder. The Government only could complain. Whether appellee did or did not have permission to enter and construct its railroad within the Crook National Forest Reserve is a matter between the railroad company and the Government, and not Mr. Van Dyke.

The Supreme Court, in the above case, construing the powers of the Secretary of the Interior under the act of March 3, 1899: "If, 'in his judgment', the public interests will not be prejudiced he 'may file and approve' surveys and plats of such right of way. In short, he is invested with a large measure of discretion to be exercised for the conservation of the public interest." And such approval of the maps by the Secretary of the Interior is equivalent to a patent to the railroad company for its right of way over the premises, at least, from the date of the construction of its road. Such decision cannot be set aside by any collateral attack and is subject only to direct attack by the government itself.

Oregon Trunk Line vs. Deschutes R. Co., 172 Fed. 738;

Jamestown & N. Ry Co. vs. Jones, 177 U. S. 125;

Noble, et al., vs. U. R. Logging R. Co., supra;

Barlow vs. Northern Pac. Ry. Co., 240 U. S. 484;

Rierson vs. St. L. & S. F. Ry Co., supra;

Oregon S. Line R. Co. vs. Quigley, 80 Pac. 401.

At the outset, it will be observed that this is not

a suit by the Government to cancel and annul a patent for fraud practiced upon the land officers in its procurement, of for any fraudulent act, error of law, or mistake committed by them, in approving appellee's application of April 16, 1909, (R., pp. 79-80, f. 161-163, Ex. "4" and "5") or the approval of the maps. There are no pleadings in this case upon which such questions could be raised.

Burke vs. S. P. R. Co., 234 U. S. 667.

When the Department filed appellee's application to enter the National forest and to construct its road on April 16, 1909, accompanied with maps of its right of way, and approved the same on July 6, 1909 (R., pp. 79-80, f. 161-163, Ex. "4" and "5"), this qualified this appellee to so enter and construct its said road, and its title was then initiated as of the date of its application to enter, or at least as of the date of construction. The extent of its grant was then fixed by the terms of the act of 1875, as to 100 feet in width on each side of the center line upon which the road was constructed. The permission of the railroad company in the Chicago, M. & St. P. R. Co. case was to enter a forest reserve upon certain conditions, neither the application, nor the permission set forth in this decision designates any particular line, but the application is to enter and construct, and the permission is granted to enter and construct, provided the railroad company did certain things. In that case the company failed to do the things it had promised as a condition on receiving the permission to enter, while in the case at bar appellee filed maps of its right of way with its application on April 16, 1909, and the government is not in this litigation complaining of the railroad company's entering into the forest reserve without permission. Mr. Van Dyke's

objection seems to be based upon the contention that the railroad company did not receive permission from the government to enter the forest reserve. If it did enter without such permission, it would be no concern of his. If the railroad company entered upon a homestead settlement of Mr. Van Dyke's, within the forest reserve, such entry to that extent he might complain of, but not of the act of entry into the forest reserve, and in the case at bar Mr. Van Dyke had no homestead settlement for appellee to invade and he had no rights upon the forest reserve at the time the railroad company entered and constructed its line.

The Supreme Court, in Barlow vs. Northern Pac. R. Co., says:

> "It would be absurd to hold that one who entered upon land and sees upon it a railroad grade which is only eighteen days from physical completion, and, as we have a right to believe, but a link in miles of road stretching across the same pairies, was not aware of this prior railroad occupancy."

IX.

It, therefore, becomes necessary to determine who was the first settler. The act of Congress, approved June 11, 1906, being the act under which Mr. Van Dyke claims his homestead, prohibits just such settlements as was attempted to be made by appellants. The Use Book, approved July 1, 1913, on page 63 thereof, and the Use Book 1908, page 290, contains the following regulation:

No Settlement Before Opening:

"This act does not authorize any settle-

ments within national forests, except upon lands which have been open to settlement under its provisions";

In Use Book, 1913, on page 64, at the top thereof, is the following:

"Occupancy Under Special Use Permit Not Residence.

"The Secretary of the Interior, by letter of January 12, 1910, ruled that the provision of section 1 of the act of June 11, 1906, which allows settlers credit for residence on lands covered by their entries, has reference to settlement initiated prior to the date of the act only, and that residence under permit issued by the forest service prior to the opening of the lands to settlement in the manner prescribed by the act is not occupancy of lands within the meaning of the homestead law and will not be credited as a part of the residential period required to secure patent." (See the Use Book 1908, page 290, Section 14, approved Sept. 7, 1906.).

Also, Regulation 3, Record, p. 85, Exhibit "B", f. 172, the following:

"The fact that an applicant has settled upon the land will not influence the decision with respect to its agricultural character. Settlement after January 1, 1906, and in advance of the opening by the Secretary of the Interior, is not authorized by the act, confers no rights, and will be considered trespass."

Section 5 of the Act of June 11, 1906 (34. Stats., 233) prohibits settlements prior to January 1, 1906. (Under I, of this brief).

Therefore, Mr. Van Dyke did not acquire settlement on the premises in question until after the land was withdrawn from the forest reserve and thrown open for settlement, and he testified on cross examination as follows:

> "It is a fact that about midnight on the 22nd day of December, 1909, I took up my residence in the house testified to. That is, I went off the ground and back on again at midnight." (R., f. 94, p. 48).

On cross-examination Mr. Van Dyke continued:

> "I took an option on the Miami claims in September, 1908. The terms of the agreement extended over a period of a year." (f. 96, p. 49). "I have never received a deed from them. Yes I have, now as I remember. It was on the 16th day of December, along about that time, December, 1909, the 16th. That was after the railroad had been constructed across these mining claims. At the time I had this conversation with Mr. Swift I had this option on these mining claims. After the option I held possession under the mining claims. I did, yes. Along in November, 1909, there was no change. Just the same condition. I was holding possession under these mining claims when I put my tent there on the 15th day of December, and was holding possession under these mining claims when I put the lumber there to

build my house. These, I presume, for the Miami Land and Improvement Company. I WAS LOOKING AFTER THEIR INTEREST. I hadn't received title yet." (R., f. 96-97, pp. 49-50).

"He" (Mr. Swift) "never issued a written permit. I never at that time had a written permit from any government official to go upon that land. I did have a verbal permission". (R., f. 91, p. 47).

On the verbal Use Permit, Mr. T. T. Swift, Forest Supervisor, testified as follows:

"I did not at any time offer to give Mr. Van Dyke a Special Use Permit to occupy any portion of that ground. I did not grant Mr. Van Dyke a Special Use Permit to occupy this ground such as he testified to. I did not give Mr. Van Dyke a verbal Special Use Permit to occupy the land involved in this litigation, and did not give him one in writing." (R., f. 99-100, pp. 50-51).

On cross-examination, Mr. Swift said: "I don't issue verbal Use Permits." (R., f. 101, p. 51). "They are all a matter of record." (R., p. 51, f. 101).

The Supreme Court in Barlow v. Northern Pac. R. Co., supra:

"It would be absurd to hold that one who entered upon land and sees upon it a railroad grade which is only eighteen days from physical completion, and, as we have a right to believe,

> but a link in miles of road stretching across the same prairies was not aware of their prior railroad occupation."

Therefore, Mr. Van Dyke had no preferential right as a homesteader to the land within the Crook National Forest, for the reason that he was not a settler, neither did he occupy the same, prior to the establishment of said National Forest Reserve. The land was never segregated from the National Forest Reserve on his application, for the reason that his application was never considered until after the executive order of the President of the United States of August 27, 1909; his application was rejected on November 2, 1909 (R., Ex. "O", f. 214, p. 104); he never acquired any right under his option, nor under the mining laws. Mr. Van Dyke claims he received his mining deed on December 16, 1909 (R., f. 97, p. 49).

A portion of the general executive order of August 27, 1909, is as follows:

> "Under authority of the Act of Congress approved June 4, 1897 (30 Stat. 34-36), and on the recommendation of the Secretary of Agriculture, it is hereby ordered that the proclamation of July 1, 1908, establishing the Crook National Forest, be modified to reduce the area of such National Forest by eliminating therefrom the following described areas in Arizona, Gila and Salt River Meridian: ***
>
> "The lands hereby excluded from the Crook National Forest which are not embraced in any other withdrawal, reservation, or appropriation, shall be restored to the public

domain and become subject to settlement under the general provisions of the homestead laws on such date and after such notice by publication as the Secretary of the Interior may prescribe, but shall not become subject to entry, filing, selection, or other form of appropriation until the expiration of thirty days from the date so fixed, and no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun prior to such date, and all such settlement and occupation are hereby forbidden." (R., f. 164-166, Ex. "6", pp. 80-81).

The Commissioner of the General Land Office, under said executive order of August 27, 1909, gave the following notice which was approved by the Secretary of the Interior:

"Notice of Restoration of Public Lands to Settlement and Entry. Department of the Interior, General Land Office, Washington, D. C., September 4, 1909. Notice is hereby given that the public lands in the following described areas which were excluded from the Crook National Forest, Arizona, by Executive Order dated August 27, 1909, if not otherwise withdrawn, reserved, or appropriated, will by authority of the Secretary of the Interior be restored to the public domain on November 22, 1909, and become subject to settlement on and after that date, but not to entry, filing or selection until on and after December 22, 1909, under the usual restrictions, at the United States Land Office, at Phoenix, Arizona ****

> Warning is hereby expressly given that no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun after September, 1909, and prior to November 22, 1909, and all such settlement or occupation is hereby forbidden.
>
> FRED DENNETT,
> Commissioner of the General Land Office. Approved September 4, 1909:
>
> FRANK PIERCE,
> First Assistant Secretary of the Interior."

(R., f. 187-188, pp. 91-92)

It appears to appellee that Mr. Van Dyke was correct as to the time of his settlement upon the premises when he testified: "It is a fact that about midnight on the 22nd day of December, 1909, I took up my residence in the house testified to. That is, I went off the ground and back on again at midnight." (R., f. 94, p. 48). Plaintiffs in error on pages 41-42 of their brief, state that Van Dyke's settlement dates from December 22, 1909.

The Executive Order of August 27, 1909, only excludes from the Crook National Forest such lands as were not embraced in any other withdrawal, reservation or appropriation (R., f. 165-166, p. 81). It will be noted that the right of way claimed by appellee was withdrawn and appropriated prior to this order. Its profile was filed in the local land office at Phoenix, Arizona, on November 5, 1908 (R. Photograph map, f. 161a, p. 79). On April 19, 1909, written application was made by appellee to enter this Forest Reserve (R., f. 161, p. 79). On July 6, 1909, the application was

approved by the Agricultural Department, Forest Service (R., f. 163, p. 80, Ex. "5"), which related back to the date of filing its application in Phoenix, to-wit, April 16, 1909, and appellee's road was constructed across this Forest Reserve and across the premises in question in August and September, 1909, all of which Mr. Van Dyke must have known at the time said executive order was issued. Therefore, the prior withdrawal and appropriation by this appellee of the lands in dispute, by the very terms of said executive order, were not restored to the public domain, and, would not be subject to entry and settlement under the homestead laws. All persons settling on said premises would have unmistakeable notice of the appropriation by appellee and would take subject to its rights. The trial court found that appellee had the written permission from the Forest Service to enter upon and construct its said railroad in and upon said reservation (R., Finding 3, f. 37-38, p. 20).

Mr. P. Jones, the engineer who was in charge of the construction of this road for appellee and who surveyed, staked and marked the road in question, says:

Q. "Now when did you begin the construction of this road over the premises in dispute, the actual construction of it?" (R., f. 72, p. 38)

A. "In August, 1909" (R., f. 72, p. 38)

Q. "When was it completed?"

A. "In September, 1909" (R., f. 72, p. 38).

On cross-examination by appellants Mr. Jones said: "The work was begun on the line in controversy in August, 1909. Cannot give the exact date other than

that it was about the first part of August, 1909 (R., f. 78, p. 41). Completed in September 1909 (R., f. 72, p. 38). Ties and rails were laid over the premises in dispute first part of October, 1909 (R., f. 73, p. 39).

This certainly shows that the road was constructed over the premises in question at least prior to the Executive Order of August 27, 1909, and the court correctly so found. It certainly is clear that, under the Executive Order, the portion occupied by appellee under the acts of 1875 and 1899 was appropriated and withdrawn from the forest reserve and the public domain with the consent of the proper department, and the said Executive Order did not affect the same, but expressly provided that all lands not embraced in any other withdrawal, reservation or appropriation should be restored to the public domain. This certainly did not mean that the right of way of appellee upon which it had constructed its road should be restored to the public domain, and so far as this record shows appellee is the only party having written permission under the law, the rules and regulations of the Interior Department giving it permission to enter upon said Forest Reserve and to construct its road thereover prior to said Executive Order. Mr. Van Dyke certainly did not show authority or permission to acquire any rights within said reservation prior to the time fixed by the Executive Order, or prior to November 22, 1909. The Executive Order does not even attempt to restore the land occupied, appropriated and withdrawn for the right of way of appellee in the Forest Reserve, and thereby subject the said right of way or any part of it to entry, selection or settlement under the homestead laws. The approval to enter the Forest Reserve was a matter of record with the Department prior and at

the date of said Executive Order of August 27, 1909, and the application with the necessary map of appellee's right of way was made and filed April 16, 1909, and approved and allowed July 6, 1909 (R., Ex. "4" and "5", f. 161-163, pp. 79-80), and the Department certainly had notice of appellee's application being filed and allowed at the time it made said order. The court found that "appellee" did during the months of August and September, 1909, complete the construction of its said railroad over and across said premises as staked and marked on the ground and on the line of said amended survey," (R., Finding 4, f. 39, p. 21), and in this same finding the court further says: "And in the months of November and December, 1908, plaintiff marked and staked its said line of railroad and right of way on the ground along the entire length of said premises described in plaintiff's complaint filed herein, to the extent of 100 feet on each side of center line, as provided for by said act of Congress". (R., f. 38-39, pp. 20-21).

Appellants' rights, if any they had prior to said Executive Order, were not excepted by the terms of said order, neither were the rights of the Miami Land and Improvement Company, for the Company was claiming under the mineral laws of the United States, and appellants were claiming under an option from the Miami Land and Improvement Company which option was never exercised, if at all, until about December 16, 1909, when Mr. Van Dyke states that he received a deed, but no deed was introduced in evidence. The Executive Order of August 27, 1909, we claim, determined the character of the land to be agricultural, therefore destroying the mineral character of the land. This must have been true, or the homestead patent of

Mr. Van Dyke would never have been issued, and this determination of the character of the land by the Department is binding not only upon Mr. Van Dyke and the other appellants but upon the courts.

Burke vs. S. P. R. Co., supra;

The Department having determined by the issuance of said Executive Order and the said Homestead Patent, that the land was not mineral, and if not mineral, there could be no valid mining location, and if there was no valid mining locations, there could be no valid possession under the same by the Miami Land and Improvement Company, as that company was attempting to hold the land under mining locations, and one of the essential elements of a valid mining location is mineral in place. The moment the land department found the character of the land to be other than mineral, the land then become subject to withdrawal under the act of June 11, 1906, under and by virtue of the executive order of August 27, 1909, at which time appellee's rights had attached under the Acts of 1875 and March 3, 1899.

Jamestown & N. Ry Co. vs. Jones, supra.

Bonner vs. Rio Grande S. Ry Co., 72 Pac. 1065.

If the land had in fact been mineral lands, appellee's right of way would have been limited to the 100 feet granted it, provided the same was never abandoned or forfeited by the then owner, but the moment it became public domain, the elimination from the National Forest, and the mineral rights gone, appellee certainly had just as much right in morals, justice or law to have its grant under the Act of 1875 take effect, as Mr. Van Dyke did in attempting to claim possession and settlement from and under the said mining claimants. If Mr. Van Dyke

wanted to prohibit appellee from claiming under the Acts of 1875 and 1899, why did he not purchase the mining rights and retain the same and obtain mineral patents? No, he wanted the land to revert to the public domain with the first right to claim the same, for the reason, as he states, there was no mineral.

The Act of June 11, 1906, under which Mr. Van Dyke claims, will not protect him unless he was a settler prior to January 1, 1906, or at least prior to the creation of the Forest Reserve. He does not claim settlement under either of these conditions. Mr. Van Dyke was not a settler on the land prior to the construction of the railroad for two reasons: First, he was not there prior to the passage of the act of June 11, 1906, nor prior to the establishing of the reserve; second, he testified that "It is a fact that about midnight on the 22nd day of December, 1909, I took up my residence in the house testified to, that is, I went off the ground and back on again at midnight." (R., f. 94, p. 48). He never had a special use permit to enter the same.

Why did he go off? Because, as he testified "I was holding possession under these mining claims when I put my tent there on the 15th day of December and when I put the lumber there to build my house. This I presume for the Miami Land and Improvement Company. I was looking after their interests". (R., f. 97, p. 50). He could not make a homestead settlement under such conditions. We are concerned here with the question, when did Mr. Van Dyke take up his settlement, not the settlement of the Miami Land and Improvement Comapny? Mr. Van Dyke cannot acquire by purchase or otherwise the settlement or occupancy of the Miami Land and Improvement Company, which was under the

mineral law, and claim such settlement as a part of his settlement under the homestead law.

Lewis vs. Rio Grande W. Ry Co., 54 Pac. 981.

Hamilton vs. Spokane & P. R. R. Co., 28 Pac. 408.

Jamestown & N. Ry Co. vs. Jones, supra;

It is true the Act of 1875 protects bona fide settlers prior to the entry of the railroad company, and this is true in the case at bar, but the settlement was that of the Miami Land and Improvement Company which was protected and acquired before entry by the railroad company, and Mr. Van Dyke had no settlement to protect at that time, therefore the railroad company could not have acquired such rights from him. It appears to us to be ridiculous, on the part of appellants, to even claim in this Court that Mr. Van Dyke's settlement dates from July, 1909, when under Mr. Van Dyke's own testimony he only claims his possession was under an option from the Miami Land and Improvement Company, who held the title to the land under mining claims, and he was then looking after their interests. (R., f. 97, p. 50). Mr. T. T. Swift, the Forest Supervisor in charge of the Crook National Forest, within which the premises in dispute was located, testified as follows: "I did not at any time offer to give Mr. Van Dyke a Special Use Permit to occupy any portion of that ground. I did not grant to Mr. Van Dyke a Special Use Permit to occupy this ground such as he testified to. I did not give Mr. Van Dyke a verbal Use Permit to occupy the ground involved in this litigation, and did not give him one in writing" (R., f. 99-100, pp. 50-51), and on cross-examination Mr. Swift said "I don't issue verbal Use Permits." (R., p. 51, f. 101). "They are all a matter of record". (R., p. 51, 101). Mr. Swift is an officer

of the Government and absolutely disinterested, and the trial court was certainly correct in accepting his testimony as to whether or not he gave Mr. Van Dyke a verbal use permit. Mr. Van Dyke testified: "I never at that time had a written permit from any government official to go upon that land. He never issued a written permit." (R., p. 47, f. 91). If Mr. Van Dyke did have a special use permit he could not acquire any rights thereunder. See the Use Book, a Manual for Users of National Forests, issued by the Secretary of Agriculture, July 1, 1913, pages 63 and 64, and 1908, page 290, (I., of this brief).

Executive Order of August 27, 1909, provides:

The lands therein described, "shall be restored to the public domain and become subject to settlement **** on such date and after such notice *** as the Secretary of the Interior may prescribe, but shall not become subject to entry, filing, selection, or other form of appropriation until the expiration of thirty days from the date so fixed," and all such settlement and occupation begun prior to such date are forbidden. (R., pp. 80-81, exhibit "6").

The Secretary of the Interior's notice pursuant to said Executive Order, dated September 4, 1909, provides: "Warning is hereby expressly given that no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun after September 1909, and prior to November 22, 1909, and all such settlement or occupation is hereby forbidden". (R., pp. 91-92, Exhibit "I").

In other words, the Executive Order forbids all settlement or occupation begun prior to and including September, 1909, and the notice of the Secretary of the

Interior forbids all settlement or occupation begun after September, 1909, and prior to November 22, 1909. Therefore, Mr. Van Dyke could not have acquired a settlement or occupation until after November 22, 1909, under the act of June 11, 1906.

The alleged application of Mr. Van Dyke was rejected November 2, 1909 (R., p. 104, f. 214, Exhibit "O").

The Executive Order of August 27, 1909, does not even pretend to have been made or issued on the application of Mr. Van Dyke, or any one else, but the entire record would indicate that it was not made on the application of Mr. Van Dyke for the simple reason he was still insisting upon his application for examination being allowed long after the date of said executive order. Even if Mr. Van Dyke had held possession under a Special Use Permit, he would not have had any preferential rights under the act of June 11, 1906, or rules and regulations governing the issuance of Special Use Permits, above set forth, to enter the lands in question under the homestead laws, and claim settlement under a Special Use Permit.

Appellants contend, on page 41, No. IX, of their brief, that Mr. Van Dyke did acquire the right of a settler on December 22, 1909, when he filed his homestead entry, at which time and long prior thereto appellee had constructed its road and was operating its trains over the same.

X.

Appellee's grant for its right of way for its railroad took effect immediately upon the actual construction of its road over the premises in question, to-wit, in August,

1909, and was completed in September, 1909 (R., f. 72, p. 38). The approval, by the Secretary of the Interior, of the amended map showing its right of way over the premises in question was filed within twelve months after the survey was completed, as required by Section 4 of the Act of 1875, the premises being surveyed lands. This approval was equivalent to a patent, and such approval will relate back, at least, to the date of construction, although a profile or map of the road had not been filed.

Barlow vs. Nothern Pac. R. Co., 240 U. S. 484.

Jamestown & N. R. Co. vs. Jones, 177 U. S. 125

Johnson vs. Spokane International Ry Co., 137 Pac. 894.

Minneapolis, St. P. & S. M. Ry Co. vs. Doughty, 208 U. S. 251.

The Supreme Court of the United States, in Stalker vs. Oregon Short Line Ry Co., 225 U. S. 142, while construing the act of March 3, 1875, explains the expression "thereafter" as used in the Doughty case, and in part says:

> "The rule gives a practical operation to the statute, and we think is correct. It enables the railroad company to secure the grant by an actual construction, or, in advance of construction, by filing a map (of its road) as provided in paragraph 4. Actual construction of the road is certainly unmistakable evidence and notice of appropriation. It was therefore held that an entry made after construction, but

before filing a map of locations, was subject to the prior right of the railroad."

Barlow vs. Northern Pac. Ry Co., 240 U. S. 484.

In the Stalker case the court, while again construing the Jones case, in part says:

> "True, this approval did not occur until after the rights of the plaintiffs in error had been initiated; but the patent to the pre-emptor did not issue until long after that approval. Upon what principle can it be held that the grant, which under any view of the case, is prior in date to the patent under which plaintiffs in error claim, is subordinate in right as to the overlap? Neither should the case of Minneapolis, St. P. & S. Ste. M. R. Co.v. Doughty, be regarded as construing the 4th section of the act as holding that, pending the the approval of a map of final location, any right may be initiated which will be superior to the title which vests upon such approval. No such question was involved in that case. What is said in the opinion about the grant of a right of way being dependent upon the doing of three things—location of road, filing profile of it in the land office, and the approval thereof by the Secretary of the Interior, and that 'thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way,' refers to the nonvesting of any right as against the United States, and not as denying the priority of right in the acquisition of the premises as between parties, growing out of priority of application."

The Supreme Court in the case of Barlow vs. Northern Pac. R. Co., supra, gives the distinction between the Doughty case and the Jones case, also the Stalker case.

Such grant takes effect upon the section of the land when the road is definitely located, by relation, as of the date of the grant.

St. P. M. & M. Ry Co. vs. Phelps, 137 U. S. 528.

Barlow vs. Northern Pac. R. Co., supra.

A railroad company may secure the grant by an actual construction of the road, or, in the absence ot construction, by filing a map as provided by section 4. Actual construction of the road is certainly unmistakeable evidence and notice of appropriation.

Jamestown & N. Ry Co. vs. Jones, supra;

Barlow vs. Northern Pac. R. Co., supra.

Minn., St. P. & M. Ry Co. vs. Doughty, supra.

Appellee's grant took effect, as far as a settler was concerned, at least upon the actual construction of the road, and the entry of the appellants was subject thereto.

Jamestown & N. Ry Co. vs. Jones supra;

Barlow vs. Northern Pac. Ry Co., supra;

Oregon S. L. vs. Quingley, 80 Pac. 401;

Oregon S. L. vs. Stalker, 94 Pac. 56.

Approved by United States Supreme Court in Stalker vs. Oregon Short Line.

It was contended in the case of Oregon Short Line vs. Quingley, 80 Pac. 401,

> "That, notwithstanding the grant of 200 feet right of way, a railroad company cannot take a decree quieting title to more than it occupies and uses or is actually necessary for the use for which the grant was made. We do not think this position can be sustained. Under these grants the question of a reasonable amount of land necessary for such use is not open to consideration and determination by the court. The grant by Congress to the Utah and Northern Railway Co. of a right of way of 100 feet on each side of the center line of its track was a conclusive determination of the reasonable and necessary quantity of land dedicated to such use and carried with it the right of possession in the grantee therein named and its successors."

The Court further proceeds:

> "It is next urged by respondents that no right vested in the railroad company upon the passage and approval of the act, but that the vesting of title to the right of way was determined on the filing of the map of definite location, as required by section 4 of the act of March 3, 1875. There could be only two purposes served by the filing of the map under the provisions of this section, *the one for the information of the government* and its land office officials to apprise them of the occupation and disposition of the public lands belong-

> ing to the government; *the other purpose for the information of settlers and purchasers* who desire to acquire rights in such public lands. In this case the government is not complaining of such failure and it does not appear upon what theory a settler can be heard to complain of the failure to perform an act by another which is solely for the information and benefit of the government."

By granting a right of way 200 feet in width, Congress must be understood to have conclusively determined a strip of that width was necessary for a public work of such importance; and it was not competent for the court at the suit of a private party, to adjudge that only 100 feet thereof was occupied for railroad purposes in the face of such grant.

Northern Pac. R. Co. vs. Smith, 171 U. S. 260;

Northern Pac. Ry Co. vs. Townsend, 190 U. S. 267;

Morgan vs. Chicago B. & Q. Ry Co., 120 N. W. 192;

Centeral Pac. Ry Co. vs. Droge, 151 Pac. 663.

It will be remembered that, if the land in question was occupied and in the possession of any person at the time the railroad entered, it was occupied and in the possession of the Miami Land and Improvement Company. Appellee acquired, by deed from this company, a 100 foot strip held by the Miami Land and Improvement Company under mining claims. The government, by its executive order of August 27, 1909, must have determined that said lands were not mineral, but agricultural lands, and subject to entry under homestead laws. This finding by the government necessarily

determined the non-mineral character of the land and the mining claims were then of no validity. At the time of this finding by the government, appellee had constructed its road over the lands in question. Mr. Van Dyke attempts to show settlement under the Miami Land and Improvement Company, but introduces no deed or other instrument showing that he had acquired possession under it, even if appellants had purchased the rights of the Miami Land and Improvement Company. There being no privity of estate between said company and the homestead filing of Mr. Van Dyke, he cannot claim his possession from and under said Company by virtue of his purchase of any rights it may have had in the premises.

Hamilton vs. Spokane & P. R. Co., 28 P. 408;

Lewis vs. Grande W. Ry Co., 54 Pac. 981;

Jamestown & N. R. Co. vs. Jones, supra.

In the Lewis case, the Court said:

> "That the respondent, who purchased improvements in November, 1877, from parties who had occupied the lands in summer for dairy purposes, moved on the quarter section in which the demanded tract is situated May 1, 1878, with intent to pre-empt the same, made pre-emption filing August 7, 1885, and obtained patent July 2, 1890, was not the prior occupant, was chargeable with notice of the company's occupancy at the time respondent made settlement, and took title subject to the right of way of the appellant, purchaser of the road.
>
> "Under the facts above stated, held that

respondent's patent did not relate back so as to divest the company of its easement, and it was immaterial that the patent contained no reservation of the right of way."

The Court further proceeds:

"The fact that the patent contained no reservation of the right of way is, under the facts of this case, immaterial. The respondents own settlement can alone be considered, unaffected by his purchase of improvements."

In Bonner vs. Rio Grande S. R. Co., 72 Pac. 1065, construing the act of March 3, 1875, between the railroad company and a prior owner of mining claims, the court says:

"A railroad filed a plat in the land office, which was approved by the Secretary of the Interior, and thereafter the road was constructed; a part of it passing through a mining claim, from the locators of which the railroad company accepted a deed for a right of way. Subsequently the mining claim was abandoned, and afterwards relocated. Held that, on abandonment of the claim, it became public land, to which the right of way of the railroad company attached, so that the relocation was subject to the easement of the railroad company."

In Denver & Rio Grande R. Co. vs. Hanoum, 34 Pac. 838, involving the right between the parties on an Indian Reservation, the court, in part, says:

"In September and October, 1881, plaintiff

settled upon the land, intending to acquire the same by pre-emption, and on July 14, 1884, made his declaratory statement or pre-emption filing for the same. On September 15, 1885, plaintiff made his final proofs and payment for the land, and obtained the receiver's certificate therefore, though the patent was not issued until 1889. Prior to plaintiff's settlement, the defendant company, in June, 1881, made the survey and location of its railroad, and in December, 1881, laid out and commenced the construction of its roadbed through the land in controversy."

"On July 28, 1882, when the land of the Indian reservation was declared to be public land, and subject to disposal as such, with certain exceptions, limitations and restrictions, the defendant company was occupying its right of way and operating its cars through the quarter section in question. At that time, also, plaintiff, having previously settled upon the land, was occupying and intending to acquire the same as a pre-emptioner. From that time continuously, and in that manner respectively, each party has ever since occupied and used the land."

"That nearly two years before (July 28, 1882), defendant had constructed its road, and was occupying its right of way and operating its cars through the land in question. At the date last mentioned there was, therefore, fixity of grantee and fixity of location or of the subject matter of the grant; so that the title

of the defendant to its right of way was then complete. The subsequent disposal of the land to plaintiff must therefore be held to have been made subject to defendant's right of way. It follows that plaintiff has no cause of action, and that judgment should have been rendered in favor of defendant."

A right of way over public lands may be obtained in two ways, even over a forest reserve after permission, and such land, after elimination, becomes public domain within the meaning of the act of March 3, 1875:

1. The actual construction of the road;

2. Upon the approval of the Secretary of the Interior after definite location and filing of the profile of the road in the local land office.

Jamestown & N. R. Co. vs. Jones, supra;

Barlow vs. Northern Pacific R. Co., supra.

XI.

Appellants cite the case of Washington & Idaho Railway Co. vs. Coeur d' Alene R. & Nav. Co., 160 U. S. 77, as authority for their possession. It appears from the Coeur d' Alene case that the Washington & Idaho R. Co., plaintiffs therein, contended that the right of way in question belonged to it by virtue of a prior survey made on its behalf. It appears that the survey was made by one W. H. Burrago for plaintiff over the lands in controversy, on October 28, 1886. The plaintiff was not even a corporation de facto or de jure at that time, but after said survey, to wit, November 10, 1886, it filed for the first time with the proper officials of the Territory of Washington its articles

of incorporation. The court was correct when it found that the said survey of October 28, 1886, conferred no right whatever on the plaintiff as against the defendant, Coeur d' Alene Company. The argument on behalf of the plaintiff in that case was that, in as much as the Washington & Idaho Company had filed its articles of incorporation and proof of organization in the office of the Secretary of the Interior at Washington, D. C., on December 22, 1886, it then had a right to adopt the survey previously made by Burrago on October 28 1886, as and for the location of its route under the general right of way act of 1875, and that when it so adopted said survey it related back to the date when made. This view of the law the court did not accept, but concurred in the conclusion of the court below, that plaintiff being neither a corporation de facto or dejure at the time the survey was made by Burrago on October 28, 1886, conferred no rights upon it to take possession of the premises, or to locate a line thereon, as against the defendant, the Coeur d' Alene Company, which was a duly organized corporation under the laws of Montana at that time and it took prior possession of the premises and located its line of road thereover and thereon. This case does not, in our opinion, support appellants' contention for the following reasons:

1. It is a case between two railroad companies, one at the time it claims to have taken possession and located its line was a corporation duly organized, when the other, being neither a corporation de facto nor de jure, was seeking to adopt a survey made prior to the filing of its articles of incorporation

under the laws of the State of Washington under which it was incorporated.

2. That the Washington & Idaho Railway Co. was not relying upon any decision or finding of the Secretary of the Interior or any other person; the Secretary of the Interior had not approved the survey of October 28, 1886, neither was the plat of such survey filed with the Secretary of the Interior when the rights of the Coeur d'Alene Company accrued, and the Washington & Idaho Railway Co. did not base its rights to the premises on any act of the Secretary of the Interior or upon the act of any other department having jurisdiction to dispose of the public lands of the United States. also,

3. In this case plaintiff did nothing but make a survey, and this was made before it was incorporated, and it sought to initiate a right by virtue of such survey, prior to the right of the Coeur d' Alene road.

4. Appellee, in the case at bar, was a corporation duly organized under the laws of Arizona at the time the Secretary of the Interior decided that it was qualified to accept the grant under the Acts of March 3, 1875, and of March 3, 1899, and filed and approved its maps and profiles and gave it permission to enter upon the Crook National Forest Reserve and construct its line of road upon the premises in question within said forest reserve. Appellee qualified October 1, 1896, under the act of 1875.

Appellee had the right after it had adopted its original line of survey and after it had filed its plat thereof, to subsequently, and within the time allowed by law, adopt another route, and, instead of filing a second plat, may construct the road on the line surveyed and adopted, so long as the rights of others have not intervened, and within twelve months after survey, if upon surveyed land, as was the case in the case at bar.

Washington & Idaho R. Co. vs. Coeur d'Alene R. & Nav. Co., 160 U. S. 77.

When the Secretary of the Interior filed and approved appellee's application to enter on July 6, 1909, and profiles, that was a finding and a decision of the Secretary of the Interior upon a mixed question of fact and law, and the same was rendered long prior to any rights of the appellants, and such a finding and decision is not only binding and conclusive as against appellants, but also upon the courts.

Noble vs. Union River Logging R. Co., supra. In this case the court says:

> "At the time the documents required by the act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, among other things, whether the railroad authorized by the articles of incorporation was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such

land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road."

In Oregon Trunk Line vs. Deschutes R. Co., 172 Federal, 738, the court says:

"Such approval is equivalent to a conveyance of patent from the government for the route delineated on the plat, and it cannot subsequently be revoked by the Secretary or his successors in office, nor can it be set aside or vacated by a court", citing Noble vs. Union River Logging R. Co., 147 U. S. 165.

Appellants contend, on page 53 of their brief, that the determination of the Secretary of the Interior upon a question of fact within his jurisdiction is conclusive, but his determination of a question of law is not conclusive, but subject to review by the courts. The pleadings of appellants will not justify this position, neither will their pleadings support the rule stated in the decisions cited by them. In order for appellants to bring themselves within the rule they contend for, they must have pleadings to support the rule. The rule is set forth by appellants on page 57 of their brief, to-wit, Ross vs. Wright, 116 Pac. 949. On reading this case it will be seen that appellants' second amended answer does not meet the requirements in order for the court to review either a question of fact or a question of law or a mixed question of fact and law upon which the Secretary of the Interior acted when he granted the permission and approved the profile of the appellee

authorizing it to enter the Crook National Forest Reserve and there construct its line.

The appellate court will presume on appeal that such approval was duly noted upon the plat as the act requires, in the absence of a showing to the contrary, and the title to the right of way vested in the railroad company, and a subsequent patent of land including the right of way, though not made subject thereto, does not divest the title so acquired by the railroad company.

Rio Grande W. Ry Co. vs. Stringham, 110 Pac. 868;

Rio Grande W. Ry Co. vs. Stringham, 239 U. S. 44;

Lewis vs. Rio Grande W. Ry Co. 54 Pac. 981.

It will be noted that appellants are not claiming, and there is no pleading upon which to base, any fraudulent acts, errors of law, or mistakes committed by the department in approving the application of April 16, 1909, with maps of right of way attached (R., Ex. "4", f. 161, p. 79) and July 6, 1909 (R., Ex. "5", f. 163, p. 80), or the filing of the original map on November 5, 1908, and the approval thereof on September 21, 1909, or the approval of the amended map on March 4, 1911, and this is not a suit by the government to cancel a patent.

Gonzales vs. French et al., 164 U. S. 338.

Burke vs. S. P. R. Co., supra.

While appellee in the case at bar, surveyed and staked its right of way in November and December, 1908, graded and constructed its line of railroad there-

on in August and September, 1909, and was operating its trains thereover by October 1, 1909, it was a corporation duly organized under the laws of Arizona, and during all of said time the Miami Land and Improvement Company was in possession of the premises in dispute, claiming the same under mining locations, and Mr. Van Dyke testified that he was then looking after the interests of the Miami Land and Improvement Company. Mr. Van Dyke removed the property line stakes placed there by appellee. The law seems to be well settled that when homesteaders acquire title to public lands over which a railroad has been constructed they must pay the government for land occupied by the railroad company.

Morgan vs. Chicago B. & Q. Ry Co., 120 N. W. 192.

The court in this case says:

> "In a circular issued by the Department of the Interior and found in 12 Land Dec. Dep. Int. 428, the following rule was announced: All persons settling on public lands to which a railroad right of way has attached take the same, subject to such right of way, and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases.' The Interior Department has also held that it was improper to include in the patent issued any exceptions making the grant subject to a railway right of way acquired under the act of 1875. Dunlap vs. R. Company, 23 Land Dec. Dep. Int. 67; Railroad Company vs. Harkness, 27 Land Dec. Dep. Int. 430; Rail-

road Company vs. Clack, 29 Land Dec. Dep. Int. 478."

> *"The use for agricultural purposes, such as grazing and cultivation by adjoining landowners of otherwise unused and unfenced parts of the right of way of a railroad company, is not inconsistent with, or adverse to, the enjoyment of the easement.* In other words, it was held that the use of a part of a railroad right of way by an adjoining owner for agricultural purposes *would not ripen into a title, however long that possession and use was continued."*

Mr. Van Dyke's rights as a settler could not begin so long as the land was in the lawful possession of the Miami Land and Improvement Company, and his rights could not begin so long as the land remained in the Crook National Forest, for the reason that he had no permission to be on the Forest Reserve, except such as he received from the mining claimants, but he testified that he took up his residence at midnight on December 22, 1909 (R., f. 94, p. 48), and prior to that time he was looking after the interest of the Miami Land and Improvement Company (R., f. 97, pp. 49-50). Mr. Van Dyke, on cross examination, says: "At the time when I talked to Mr. Swift, there were mining claims over a portion of these lands. They covered the right of way and where the house is. It is a fact that at that time they belonged to the Miami Land and Improvement Company as mining claims, that they had title to it," (R., f. 96, p. 49).

The fact that Van Dyke may have had possession of the lands in controversy since his entry and settlement on December 22, 1909, does not give him the better

right, and this is claimed by him without any pleadings to support his position. Such, however, is not the law when the title is claimed under the acts of March 3, 1875, and of March 3, 1899, with permission from the Secretary of the Interior granting the railroad company the right to enter the forest reserve. Such rights of way cannot be lost by adverse possession of any part of such right of way, by a private individual, however long the possession has continued.

Central Pac. Ry Co. vs. Droge, 151 Pac. 663;

Northern P. R. Co. vs. Smith, 171 U. S. 260;

Morgan vs. Chicago B. & Q. Ry Co., 120 N. W. 192;

Roberts vs. Sioux City & P. Ry Co., 102 N. W. 60;

Under the law, if the appellee is entitled to any right of way whatever, it is entitled to one hundred feet on each side of the center of its track.

Congress itself has fixed the amount of the grant and determined what amount was reasonable and necessary for a railroad right of way. This was properly a legislative function and cannot be reviewed by the courts. Congress had the power to give a right of way as wide or narrow as it saw fit. Having said that it should be one hundred feet on each side of the center of the track, it may be no more nor less.

Oregon Short Line R. Co. vs. Quingley, 80 Pac. 401;

Northern Pac. R. R. Co. vs. Smith, 171 U. S. 260;

Northern Pac. Ry Co. vs. Townsend, 190 U. S. 267;

Moran vs. Chicago B. & Q. R. Co., 120 N. W. 192;

Central Pac. Ry Co. vs. Droge, 151 Pac. 663.

XII.

SUMMARY OF DATES:

October 1, 1896, Gila Valley, Globe and Northern Railway Company filed its Articles of Incorporation, and proof of organization with the Secretary of the Interior, as required by the Act of March 3, 1875. (Plaintiffs in error's brief, p. 13, and Par: II; R., pp. 9-10 of their answer). This act does not require amended articles nor new proof of organization to be filed.

In March, 1906, original survey was made.

November 5, 1908, original map filed, local land office, Phoenix, Arizona.

September 21, 1909, original map approved by Secretary.

November and December, 1908, amended survey made and staked on ground.

April 1909 commenced construction on Globe-Miami extension.

April 16, 1909, railroad company made application with maps submitted to enter and construct on forest reserve.

July 6, 1909, application granted.

August 1, 1909, commenced construction over premises in dispute.

September, 1909, completed such construction.

October 5, 1909, trains running over road.

December 22, 1909, Mr. Van Dyke, at midnight, made his entry and homestead settlement.

On page 41—IX, Appellants' Brief, it is stated that Mr. Van Dyke's homestead settlement was on December 22, 1909. This is an admission as to date of settlement, and in no instance do they claim homestead settlement prior to August 15th, 1909. (p. 48, Section II, of their brief).

Appellee obtained two permissions to enter the forest reserve; one on September 21, 1909, by approval of map filed November 5, 1908; the other, on July 6, 1909, by granting application of April 16, 1909.

XIII.

SUMMARY OF ARGUMENT, POINTS AND AUTHORITIES.

1. That at all times mentioned in the pleadings in this case prior to November 22, 1909, the premises in question were part and parcel of the Crook National Forest. If so, the following propositions of law follow:

(a) There was no law under which Van Dyke could have initiated any homestead settlement, under a Use Permit, or otherwise, prior to November 22, 1909. Use Books 1908 to 1913, issued by Secretary of Interior, pages 60 and 63; Act of June 11, 1906, 30 Stats. at Large, 1233, and 1909 supp. to Fed. Stats. Ann., P. 662, Secs. 1 and 5. (Under I., of this Brief).

(b) There was a law under which a railroad company could enter upon the forest reserve, survey, map or plat, and construct its railroad line across such reserve, upon compliance with the acts of March 3, 1875, and March 3, 1899, and the regulations thereunder.

Railroad Right of Way Regulations, Approved May 21, 1909; Use Book 1913, pp. 70-71, also The Use Book 1909, page 287. (Under I., of this Brief).

2. That the railroad company had actually constructed its railroad over the premises in question prior to said 22nd day of November, 1909, to wit, prior to the 5th day of October, 1909, on first of August, 1909. From which it follows as a further matter of law,

(a) That at the time when said road was actually constructed over said premises Van Dyke had no title whatever, nor had he even initiated any title, thereto; but, the premises were government lands, at the time the railroad was actually constructed, and were subject to the disposal of a right of way thereover to the railroad company, by the government, but were not subject to disposal to a homesteader. From these facts the following propositions arise:

(b) That the railroad company had the permission of the proper authorities when it entered upon the premises and actually constructed its railroad, was qualified to acquire title to the right of way, and had complied with all laws necessary to entitle it to construct its said railroad thereon, for the reason that there can be no presumption that the railroad company violated any law, by going upon the forest reserve and constructing its railroad, or that the government or any of its officers violated the laws or any duty by permitting the railroad to be so constructed in violation of the law; but upon the contrary, the law presumes that even a private citizen proceeds by right and not by wrong, and that public officers perform their official duties. City of Maysville vs. Trues (Mo.), 139 S. W. 390, 393; Cincinatt, N. O. & T. Pac. Ry Co. vs. Rankin,

241 U. S. 319, and cases cited. The answer nowhere states any facts showing that any particular act done or omitted upon which any violation of law or duty, upon the part of the railroad company or the government or any of its officers, can be predicated. The answer only contains broad denials of the rights of the appellee, which denials are mere conclusions of the pleader.

3. That the railroad company, after its application with map of right of way attached, dated April 16, 1909, was granted, July 6, 1909, (Ex. "4" and "5", f. 161-163, pp 79-80), it entered and constructed its road and filed its amended map or profile showing its right of way over and across the premises in question on the 30th day of December, 1909, and within one year after the survey thereof, as required by section 4 of the act of March 3, 1875, and after the construction of its road on said survey, which map or profile was approved by the Secretary of the Interior. From this the following propositions of law arise:

(a) That the approval of said map by the Secretary of the Interior is equivalent to a patent to the railroad company for its right of way over the premises from the date of the construction of its road, if not from the date of filing its application to enter and construct on April 16, 1909.

Oregon Trunk Line vs. Deschutes R. Co., 172 Fed. 738;

Jamestown & N. Ry. Co. vs. Jones, supra;

Noble, et al., vs U. R. Logging R. Co., supra;

(b) Such approval of the map relates to the date of actual construction, in August, 1909, or to the date

of granting permission to construct, July 6, 1909, and under the admissions contained in the answer cannot be later than October 5, 1909, which was prior to the earliest possible date, November 22, 1909, upon which the defendant homesteader could have possibly initiated his title.

Barlow vs. Northern Pac. R. Co., supra;

Rierson vs. St. L. &. S. F. Ry. Co., supra;

Jamestown N. R. Co. vs. Jones, supra;

Oregon Short Line vs. Quigley, supra;

Oregon Trunk Line vs. Deschutes, R. Co., supra;

(c) Such approvals of the Secretary amounts to a decision that all preliminary steps necessary to such decision have been taken, and that all documents required by the Acts of March 3, 1875, and March 3, 1899, were laid before the Secretary of the Interior and were approved by him; and such decision cannot be set aside by any collateral attack, and is subject only to direct attack by the government itself, and is absolutely as as against every homestead settler whomsoever who had not initiated any title prior to the date when the grant to the railroad company took effect, to wit, the date of construction; and no such homestead settler can in any way question such approval or decision.

Rierson vs. St. L. & S. F. Ry. So., supra;

Noble, et al. vs. U. R. Logging R. Co., supra;

Burke vs. S. P. R. Co., supra;

Oregon Trunk Line Ry. Co. vs. Deschutes R. Co., supra;

Oregon Short Line R. Co. vs. Quigley, supra.

The Supreme Court, in Barlow vs. Northern Pac. R. Co., supra:

> "We would not in any event disregard the finding of fact of the court below except upon conviction of clear error committed, for which the record here affords no ground whatever; and second, because as the finding of the court below was also the finding of the trial court, the request invites us to disregard the findings of both courts on a matter of fact in the absence of any ground for a conviction that error of fact was clearly committed."

The original map filed November 5, 1908, and approved September 21, 1909, and the map approved March 4, 1911, complied with the forms set forth in the General Land Office Regulations Concerning Railroad Rights of Way over Public Lands, Approved May 21, 1909, and the presumption must be that the map of the right of way submitted on April 16, 1909, for permission to enter and construct over the Forest Reserve, and referred to in Ex. "4" and "5" (R., f. 161-163, pp. 79-80), also complied with said forms, the law and all other rules and regulations of the several departments.

We submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

CHARLES L. RAWLINS,
Attorney for Defendant in Error.
Globe, Arizona

Office Supreme Court, U. S.
FILED
OCT 9 1918
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1918

No. 59

CLEVE W. VAN DYKE, IDA A. VAN DYKE
HIS WIFE, AND PATRICK H. McGUIRE,
Plaintiffs in Error

vs.

ARIZONA EASTERN RAILROAD COMPANY
A CORPORATION
Defendant in Error

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR ON APPENDIX "B", SET FORTH IN BRIEFS FOR PLAINTIFFS IN ERROR AND SERVED ON THE DEFENDANT IN ERROR ON SEPTEMBER 26, 1918, WITH MOTION TO STRIKE.

CHARLES L. RAWLINS,
Attorney for Defendant in Error

Service of three copies of the within accepted this.....day of October, 1918.

Attorneys for Plaintiff in Error

In the Supreme Court of the United States

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Comes now the Arizona Eastern Railroad Company, defendant in error above named, by its attorney of record, Charles L. Rawlins, and moves this Honorable Court to strike from the Brief of plaintiffs in error, served upon counsel for defendant in error on Septem-

ber 26, 1918, Appendix "B", for the reasons herein set forth:

FIRST

Upon the ground that said Appendix "B" was never at any time offered or introduced in evidence on the trial of this cause.

SECOND

Upon the ground that said Appendix "B" was never at any time a part of the record in this cause.

THIRD

Upon the ground that it is an attempt on the part of plaintiffs in error to impeach the testimony of Mr. Van Dyke, their own witness, and one of the parties to this litigation.

FOURTH

Upon the ground that this is the first time in the history of this litigation that plaintiffs in error have ever attempted to have a court consider the date "December 22, 1909," as an error; the first time plaintiffs in error have attempted to impeach their own witness, and is the first time evidence outside of the record has been introduced.

FIFTH

Upon the ground that the record as prepared by plaintiffs in error, approved and certified by the Supreme Court of the State of Arizona, and filed in this court, speaks absolute verity, and the same cannot be

impeached by the recitals in an ex parte affidavit which has never been made a part of the record in this cause.

SIXTH

Upon the ground that the same is improper practice. Improper for the reason above stated.

ARGUMENT

Plaintiffs in error on April 29, 1918, served defendant in error with their first brief. On page 30 of this first brief they state that a photograph copy of an affidavit was attached, but no affidavit appeared in the brief. At the time defendant in error served its brief on counsel for plaintiffs in error, to wit, September 24, 1918, the affidavit, as set forth as Appendix "B", had never been received. On September 26, 1918, plaintiffs in error served their second brief upon counsel for defendant in error with said Appendix "B" attached. Therefore this procedure.

Counsel for plaintiffs prepared on the trial Findings of Fact reciting the true date as December 22, 1909. They heard the testimony of their client, Mr. Van Dyke, on the trial when he gave December 22, 1909, as the date of settlement. They prepared the bill of exceptions on appeal from the Superior Court of Gila County to the Supreme Court of the State of Arizona, setting forth the evidence and gave the date correctly, to wit, December 22, 1909. On motion of counsel for plaintiffs in erorr, the trial court, as required by law, examined, allowed and settled appellants' bill of exceptions with December 22, 1909, as the correct date (R., p. 52, f. 102). We are concerned with Mr. Van Dyke's testimony at the trial as stated in the record. The date, December

22, 1909, is not an error but is the true date as testified to in open court, under oath, by Mr. Van Dyke on a cross-examination, and this is true notwithstanding any statement that may be in Appendix "B". The bill of exceptions made by plaintiffs in error to this court is correct as to the date "December 22, 1909", and gives this date just as it was testified to by Mr. Van Dyke. The assignments of error to this court contain the same date, to wit, December 22, 1909, (R., pp. 121-127, f. 257-269-263-264-265), and were allowed with "December 22, 1909," as correct date (R., p. 128, f. 269). If Mr. Van Dyke's testimony has been "bungled up", he alone must bear the responsibility.

Plaintiffs in error, in their cross-complaint, allege: "THAT SINCE THE SAID 22nd DAY OF DECEMBER, 1909, THE SAID CLEVE W. VAN DYKE HAS BEEN THE OWNER AND ENTITLED TO THE POSSESSION AND IN POSSESSION AND OCCUPANCY OF SAID S. E. ¼ OF SECTION 30". (R., p. 18, f. 34).

Mr. Van Dyke declared under oath while a witness on the trial of this case, as follows:

> "It is a fact that about midnight on the 22nd day of December, 1909, I took up my residence in the house testified to". (R., p. 48, f. 94).

Said Appendix "B" does not disclose on what date said affidavits were filed with the General Land Office, or with any other Government official, or if at all. There is nothing to indicate on said Appendix "B" when the paper came into the possession of the Land Office.

We have been unable to discover a filing date upon said Appendix "B".

WHEREFORE, defendant in error prays that said Motion to Strike said Appendix "B" be granted, or that this Honorable Court refuse to consider the contents thereof for the reasons herein assigned.

CHARLES L. RAWLINS,
Attorney for Defendant in Error.

Counsel for Parties.

VAN DYKE ET AL. *v.* ARIZONA EASTERN RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 59. Argued November 19, 1918.—Decided December 9, 1918.

A railroad company, having surveyed a line over public land and filed map and application for right of way under the Act of March 3, 1875, (which affects public land only,) and the land having in the interim become part of a National Forest, made application, upon the same map, to the Commissioner of the General Land Office for permission to construct in the Forest; received such permission from the Forest Service, to which the matter was referred; amended its location somewhat, so as to lay the right of way, staked 200 feet wide, across a mining claim in the Forest; obtained conveyance of 100 feet in width from the mining claimants, and constructed and operated its road. Thereafter, the original application was approved by the Secretary of the Interior, and thereafter the tract crossed was thrown open to entry.

Held, (construing the Act of 1875, *supra*, and the Act of March 3, 1899, relating to rights of way in forest reservations,) (1) That the right of the railroad, to the full 200 feet, was superior to the right of one who held under the mining claim until the land was thrown open and who then settled, and ultimately obtained patent, under the Homestead Law, although his homestead right was initiated before the company amended its map to show the change of location and before the Secretary approved the application as thus amended. P. 53.

(2) That the question whether failure to describe the route in its charter left the company without power to construct upon it, and unqualified to receive the grant, was not subject to be raised by the homesteader. P. 54.

18 Arizona, 220, affirmed.

THE case is stated in the opinion.

Mr. William C. Prentiss, with whom *Mr. Richard E. Sloan* and *Mr. F. C. Jacobs* were on the brief, for plaintiffs in error.

Mr. Charles L. Rawlins for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of affirmance of a judgment rendered in the Superior Court of Gila County, Arizona, quieting the title of the Railroad Company to 2.23 acres of land in the N. W. ¼ of the S. E. ¼, Sec. 30, T. 1 N., R. 15 E., Gila County, Arizona.

The trial court made findings of fact which were concurred in by the Supreme Court. And we see no reason for not accepting them, notwithstanding plaintiffs in error urge a review of them. They are as follows:

The railroad, as the successor of the Gila Valley Globe & Northern Railway Company, acquired its rights, including rights of way and all other assets. In March, 1906, the latter company platted a line of railroad from Globe to Miami, Arizona, about nine miles in length, passing over and across certain public land, and, November 5, 1908, filed in the local land office its map or profile of definite location as provided by the Act of Congress of March 3, 1875. Prior to that time the land covered by the map as well as the land in dispute was thrown into the Crook National Forest Reserve. April 19, 1909, written application to the United States Department of Agriculture, Forest Service, with map of right of way attached, was made by the railroad to enter and extend its line across a portion of the Forest Reserve. The railroad was given permission, on July 6, 1909, to enter the reservation and to locate and construct its road therein. The map and profile of its road was approved September 21, 1909, by the Secretary of the Interior in accordance with the act of Congress.

In April, 1909, the Globe Company commenced the construction of its road and completed it in September of that year, and it and the appellee company have operated trains ever since October, 1909. Before construction was commenced, to-wit, in November and December, 1908,

the Globe Company amended its line of survey and changed the course of its road upon and across the land in dispute and along its entire length to the extent of 100 feet in width on each side of the center line of its railroad and constructed its road on the amended location conforming on the ground to the staked and marked line.

At the time of the amended location the land was held by the Miami Land & Improvement Company, a corporation, as mineral land, and the Globe Company accepted a deed from it to a right of way across the land. By executive order the land in dispute was restored to the public domain December 22, 1909, on which date appellant, Cleve Van Dyke, filed upon the same under the homestead law. He had theretofore accepted it under an option to purchase as a mineral location from the Miami Improvement Company. On that date he went off the land, but immediately returned and established his residence with a view to homesteading. In due course he made final proof and on February 12, 1912, a patent without any reservation was issued to him for his homestead.

December 30, 1909, the Globe Company filed its amended map and profile of its right of way in the local land office which was regularly and duly approved March 4, 1911.

Van Dyke attempted to show that he had established residence upon the land prior to December 22, 1909, the date upon which he filed his homestead entry. But it is clear that he did not go upon the land prior to its inclusion in the Forest Reserve. He was upon the land under the option to purchase mentioned, and he attempted to show that he was there under a verbal permit from the Forest Supervisor with the intention of entering the land as a homestead and that he made application to the Forestry Department for an examination and listing thereof under the Act of June 11, 1906 [c. 3074, 34 Stat. 233]; application, however, was rejected.

That he did not rely upon the settlement prior to December 22, 1909, is clearly shown by his testimony. He said: "It is a fact that about midnight on the 22nd of December, 1909, I took up my residence in the house testified to. That is, I went off the ground and back on again at midnight." December 22nd was the first time the land could have been settled upon without permission from the National Government, and this permission he did not obtain.

Upon these facts the Supreme Court said certain contentions arose: (1) It is that of the railroad that its rights were fixed and established in August and September, 1909, when it completed the construction of its railroad. (2) Opposing, plaintiffs in error assert that, because the railroad changed its route as located by its original map and profile approved by the Secretary of the Interior, it acquired no rights until it filed with the local land office on December 30, 1909, its amended map of location, which was too late, Van Dyke having taken the land as a homestead December 22, 1909. And to the contention of the company that if the land was public it was not bound to follow the line shown on its map and profile, plaintiffs in error reply that the land had ceased to be public land by being thrown into the National Forest Reserve and that the railroad was hence restricted to the specific right of way shown on its approved map and profile; or, if changed to another and different route, the consent of the Interior Department was necessary and that such permission had not been given and hence the railroad acquired no rights, at least against plaintiffs in error. It is conceded, however, that the railroad company was entitled to a right of way to the extent of 50 feet on each side of the center of its line of track acquired by deed from the Miami Land & Improvement Company, in the execution of which deed Van Dyke "acquiesced." Therefore, as said by the Supreme Court, "Fifty feet on each side of

the center line of the track, or 100 feet of the right of way, are not involved in this suit; the area in question being the excess of 100 feet up to 200 feet, amounting to 2.23 acres."

We have had occasion to consider the Act of 1875, 18 Stat. 482, and what constituted a definite location of the right of way under it, and have decided that such event occurs by the actual construction of the road. *Jamestown & Northern R. R. Co.* v. *Jones*, 177 U. S. 125; *Minneapolis &c. Ry. Co.* v. *Doughty*, 208 U. S. 251; *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142.

It was found by the courts below that the construction of the railroad was commenced in April, 1909, and completed September, 1909, and that trains have been operated on it ever since. This satisfies the condition expressed in the cited cases of the appropriation of a right of way. But it is objected that the land was not then subject to appropriation, being within a Forest Reserve. In reply the Act of Congress of March 3, 1899, c. 427, 30 Stat. 1233, is adduced. It reads as follows: "That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

Of this act we said, in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, 357, 358, that it commits to the Secretary of the Interior the question of determining whether the public will be injuriously affected by the grant of a right of way to a railroad through a forest reserve and authorizes him to file and approve surveys and plats of the right of way. The measure of his discretion is large and only through his approval can a right of way be acquired.

The condition was satisfied in this case. The Globe Company—to the rights of which defendant in error

succeeded—in 1906, in preparation for the construction of its road, platted its road and filed in the local land office its map and profile of definite location under the Act of 1875, in November, 1908. Several months prior to the latter date the land of the platted line and the land in dispute were thrown into the Crook National Forest Reserve. In the following year the railroad company made application to the Commissioner of the General Land Office for permission to enter the reserve and to locate and construct its road thereon. And the application was communicated to the Department of Agriculture and approved by the Acting District Forester; the permission was granted and the map and profile of the road was approved September 21, 1909, by the Secretary of the Interior, pursuant to the Act of Congress of March 3, 1875. The road was constructed, and, as we have said, completed in September, 1909, and put in operation in October. And these successive steps were before the date on which Van Dyke attempted to initiate a homestead right. The discretion of the Secretary of the Interior was therefore exercised, and we agree with the Supreme Court that we cannot infer a rule of the Department which precluded the granting of permission upon the original map and profile.

Plaintiffs in error contend that the railroad company had no power to construct a road from Globe to Miami, Arizona, because its charter failed to designate such a line as within the project for which it was incorporated. This was made an issue by the pleadings and the court found against it. Besides, it is not within the province of plaintiffs in error to make the objection; it was a matter for the Secretary of the Interior to determine. And, again, plaintiffs in error have not such relation to the railroad company as to complain of the exercise of power outside of its charter.

Judgment affirmed.